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5791

*Dibell, J.*

207

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in  
the year of our Lord one thousand nine hundred and thirteen,  
within and for the Second District of the State of Illinois:

Present--The Hon. CHARLES WHITNEY, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

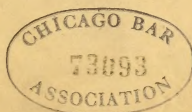
Hon. DUANE J. CARNES, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

—183 I.A. 19

BE IT REMEMBERED, that afterwards, to-wit: on the 2d day  
of August, A. D. 1913, the opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, to-wit:







Gen. No. 5791.

A. S. Hall, appellee

183 I.A. 19

vs

Appeal from Rock Island.

Herbert D. Blakemore, appellant.

Dibell, J.

On October 1, 1907 Hall brought this action of replevin against Blakemore to recover a typewriter, which not being found, the action was turned into trover and Hall had a judgment from which Blakemore appealed to the circuit court, where there was a jury trial and a verdict and a judgment for Hall for \$40. from which Blakemore prosecutes this appeal.

Hall's proof tended to show that at the time of the transactions here involved Hall lived in Davenport Iowa and represented the L. C. Smith & Bros. Typewriter Company, and took an order from Blakemore for several typewriters and ~~these~~ they were delayed in reaching Blakemore, and Hall offered to loan Blakemore a Smith-Premier typewriter which he himself owned, and Blakemore accepted the offer and Hall loaned him a machine. Afterwards, Hall demanded his machine and Blakemore did not return it. Then Hall began this suit. The proof showed that the value of this typewriter was \$45. Hall was cross examined as to his ownership of this typewriter and he testified that he obtained it from a party for his company and then decided to keep it for himself and remitted the price to his company. Blakemore argues that he should have produced a bill of sale from his company in order to show himself the owner. As he remitted to the company and there is no proof that it returned the remittance or repudiated the transaction this was sufficient proof of ownership in Hall. He also called Blakemore as a witness who testified that he

1831.A.19

Appeal from Rock Island.

Gen. No. 5701.  
A. S. Hall, appellee

vs

Harbert D. Blakemore, appellant.

Dibell, J.

On October 1, 1897 Hall brought this action of replevin

against Blakemore to recover a typewriter, which not being

found, the action was turned into trover and Hall had a

judgment from which Blakemore appealed to the circuit court,

where there was a jury trial and a verdict and a judgment

for Hall for \$40. from which Blakemore prosecutes this ap-

peal.

Hall's proof tended to show that at the time of the

transactions here involved Hall lived in Davenport Iowa and

represented the L. G. Smith & Bros. Typewriter Company,

and took an order from Blakemore for several typewriters

and that they were delayed in reshipping Blakemore, and

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which he himself owned, and Blakemore accepted the offer

and Hall loaned him a machine. Afterwards, Hall demanded

his machine and Blakemore did not return it. Then Hall

began this suit. The proof showed that the value of this

typewriter was \$45. Hall was cross examined as to his

ownership of this typewriter and he testified that he ob-

tained it from a party for his company and then decided

to keep it for himself and remitted the price to his company.

Blakemore argues that he should have produced a bill of

sale from his company in order to show himself the owner.

As he remitted to the company and there is no proof that

it returned the remittance or repurchased the transaction

this was sufficient proof of ownership in Hall. He also

called Blakemore as a witness who testified that he

received this machine from Hall and did not buy it and that he thought it was loaned to him. Hall also introduced a letter, written by Blakemore to Hall's Company, in which he alluded to "a Smith-Premier which Mr. Hall loaned me." This proof made a prima facie case for plaintiff. Blakemore offered in evidence an affidavit for replevin, a replevin bond and a writ of replevin in a suit begun February 5, 1937 by L. C. Smith & Bros Typewriter Company against Blakemore to recover three typewriters. The court sustained objections to this proof. It is argued that this was error. There are various reasons why this objection was properly sustained. The suit in which those papers had been filed was not between the same parties as this suit, and was begun about six months before this suit, and no offer was made to show what disposition was made of that suit, and for aught that this record shows, it may have been dismissed before this suit was begun. This suit is to recover "one Smith-Premier Typewriter, Model No. 4, Medium Roman Type." Hall testified that this machine was a No. 4. Serial No. 34357, while the other suit was for one L. C. Smith typewriter No. 1, 1771; one L. C. Smith No. 1, 1748; one Smith-Premier No. 4, 5400. plus, with Roman Type medium. Therefore that suit appears to have been for other machines than the one here involved. Again, if this was the same machine described in that proceeding, the fact that the plaintiff in that case laid claim to this machine would not be a defense to Blakemore here. That suit was begun by one F. D. Letts, an attorney, and he filed his affidavit as to the ownership of the machines described therein. That affidavit was not competent evidence against Hall. If Letts knew any facts tending to show that Hall was not the owner of this machine, Blakemore should have called





him as a witness or should have taken his deposition.

When Blakemore was called as a witness for Hall he testified in chief that he thought this machine was loaned to him. His counsel, cross examining him, asked what conversation occurred between himself and Hall at that time and an objection was sustained to that and similar questions. Blakemore had not been asked on direct examination

for any conversation and this was not competent cross examination, unless his saying that it was a loan was really giving the substance of a conversation. But even if the question should have been answered, Blakemore soon after became a witness in his own behalf and his counsel had the fullest opportunity to call for any material conversation between himself and Hall and did not do so and, as he did not choose to call for such a conversation when he had a clear right to ask for it, he cannot be heard to complain now because he was not allowed to ask it on cross examination. Blakemore denied that Hall made demand upon him for this machine. That raised a question of fact for the jury. It is clear that he has never been willing to return it. We find no reversible error in the language addressed to the jury nor any substantial defense interposed.

The judgment is affirmed.

... ..



STATE OF ILLINOIS, }  
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate  
Court, in and for said Second District of the State of Illinois, and keeper of the Records  
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the  
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the  
seal of the said Appellate Court, at Ottawa, this second day  
of August, in the year of our Lord one thousand nine hun-  
dred and thirteen.

---

*Clerk of the Appellate Court.*



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in  
the year of our Lord one thousand nine hundred and thirteen,  
within and for the Second District of the State of Illinois:

Present--The Hon. CHARLES WHITNEY, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. DUANE J. CARNES, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

183 I.A. 21

BE IT REMEMBERED, that afterwards, to-wit: on the 2d day  
of August, A. D. 1913, the opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, to-wit:

1076

1076

1076



Gen. No. 5794

G. A. Anderson, appellee

183 I.A. 21

vs

Appeal from Kane.

H. P. Crane, appellant.

Dibell, J.

Anderson sued Crane before a justice and had a judgment and Crane appealed to the circuit court, where there was a jury trial and a verdict and a judgment for Anderson and Crane again appeals.

Anderson was a contractor and proved that he was employed by Crane to build certain closets, etc. in Crane's house and that he did the work as directed by Crane, the actual labor being performed by his employee, Victor Anderson, and that he charged forty cents per hour for the labor and that this was the customary price therefor in that locality and that he had often done work for Crane before and had always charged that price and that the price he charged for certain oval glass doors was their fair market value. The suit was begun nearly four years after the work was done and neither Anderson nor his employee could state from memory alone the exact days when labor was performed, nor the number of hours each day. After oral testimony the court admitted the following from a small pass book carried by Anderson: "Carpenter work from October 16th. to the 29th, 88 hours, \$35.20; carpenter work from November 30 to December 22, 31 hours, \$12.40; January 5, 3 hours, \$3.30; 2 lights oval glass, \$6.50. Total \$61.70." It is contended that this should not have been admitted. The proof showed these facts. At the close of each day's work Victor set down in a book he carried the number of hours he had worked that day and at the end of each week he

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1. The first step is to identify the problem or goal. This involves understanding the current situation and what needs to be achieved.

copied upon a sheet of paper, torn by him from his book, the total number of hours he had worked that week and he gave this to Anderson. Anderson copied these entries into a large book kept by him, and afterwards copied from that into this small pass book what is above set out. Victor testified that he did not customarily reserve these accounts of his time, and that he had looked for this particular book and had been unable to find it. The slips which he gave to his employer, Anderson had not retained. Anderson had a fire in his house and supposed that this large book, into which he copied these entries, was destroyed in the fire, as he could not afterwards find it where ~~it~~ he was accustomed to keep it. Before the fire he had copied off into this small pass book the totals relating to his account against Crane.

The use of totals in evidence where the items have been destroyed by fire has been sustained in *Insurance Company v Weide*, 9 Wall. 677, and *Insurance Company v Weides*, 14 Wall. 327, and these authorities, and the principles otherwise supporting this evidence, introducing a copy where an original slip has been destroyed, were applied in *Chicago & Alton R. R. Co. v American Strawboard Co.* 81 Ill. App. 535, and 190 Ill. 368. *Chisholm v Beaman Machine Co.* 180 Ill. 101, is also in point. We conclude that this evidence was competent.

But, if not competent, in and of itself, it was made competent by another item of proof. Anderson afterwards mailed a statement to Crane of this account, and he testified that the statement was in the exact language above quoted from his book. He talked with Crane about the matter several times afterwards and Crane never disputed the





correctness of the account, and at the last interview Crane said "When you fix my barn roof I will pay you, and not before." The matter concerning the barn roof was not involved in this bill, and, if Crane had any offset on account of a barn roof, the burden was upon him to show it, and he introduced no proof whatever at the trial. Where an account is rendered and retained without objection after the expiration of a reasonable time within which to object to the correctness of the charges, this tends to establish an admission by the Debtor of the correctness of the bill. *Teigle v Brantigan*, 74 Ill. App. 385; *Woolner Distilling Co. v P. & E. Ry. Co.* 136 Ill. App. 479, and cases there cited; 1 CYC 375. It is true that Anderson did not notify Crane to produce the statement so rendered, and oral evidence was not competent to establish the contents of the statement without such prior effort to produce the original. But the objection to this evidence was not put on <sup>that</sup> ~~the~~ ground, and the general objection made to the evidence was properly overruled.

The trial judge asked numerous questions and appellant contends that they were so framed as to assist appellee and that this was improper and calculated to prejudice the jury against appellant. No such objection was made during the trial. If objection had been made to the action of the court on that ground, it may be that the court would have desisted. The evident object of the questions was to draw out the actual facts, and, frequently, to enable the court to rule understandingly upon objections interposed. Under the evidence the judgment is just and should not be reversed for any slight errors in the rulings.

The judgment is therefore affirmed.

*Affirmed.*



STATE OF ILLINOIS, }  
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate  
Court, in and for said Second District of the State of Illinois, and keeper of the Records  
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the  
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the  
seal of the said Appellate Court, at Ottawa, this second day  
of August, in the year of our Lord one thousand nine hun-  
dred and thirteen.

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*Clerk of the Appellate Court.*



5802

209

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in  
the year of our Lord one thousand nine hundred and thirteen,  
within and for the Second District of the State of Illinois:

Present--The Hon. CHARLES WHITNEY, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. DUANE J. CARNES, Justice.

— CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

183 I.A. 22

*R H denied**Oct 9. 1913*

BE IT REMEMBERED, that afterwards, to-wit: on the 2d day  
of August, A. D. 1913, the opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, to-wit:





Gen. No. 5802.

Peter Schoenhofen Brewing Co.,

Appellee.

183 I.A. 22

vs.

Appeal from Co. Ct. Peoria.

Daniel E. Pugh, appellant.

Dibell, J.

The Peter Schoenhofen Brewing Company brought forcible detainer for premises at the corner of First and Elliott Streets in Peoria and had a judgment before a justice, from which the defendant, Daniel E. Pugh, appealed to the county court of Peoria County, where there was a trial without a jury and the court rendered judgment in favor of the plaintiff for the recovery of said premises and costs and defendant below appeals.

Appellee proved that in June 1911 it was in the possession of the premises and at that time leased them to appellant from month to month and that appellant took possession under said leasing and was still in possession at the time of the trial. Appellee proved that on June 23 1912 it served the proper notice to terminate said lease in July 31, 1912. Appellant did not surrender possession and appellee began this action on August 1. This proof made a prima facie case for appellee. Appellant sought to show in defense that appellee obtained possession of these premises by a written lease from Johanna M. Ambrose; that appellee failed to pay the rentals for May and June 1912, when due, but refused to pay the same on demand, and that Mrs. Ambrose, under the terms of her lease to appellee, declared the lease terminated and leased said premises to one Willis M. Ballance, Junior, and notified appellant that he must make arrangements with the Gippa Brewing Company if

1831.A.22

(62)

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From the 22nd of May to the 2nd of June

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The following is a list of the names of the persons who

attended the meeting of the Board of the

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he remained, and that thereupon Ballance notified him that he must take their beer or get out and appellant then attorned to Ballance or the Gips Brewing Company. The court below sustained objections of appellee to all evidence which tended to destroy the landlord's title, and excluded the same, and found for appellee. No propositions of law were offered, and the correctness of the foregoing rulings is the only question presented. Appellant admits the general rule that a tenant cannot dispute his landlord's title, but claims that among the exceptions to that rule is the case where the landlord's title has terminated, and that what he sought to show here was that the title of appellee had ended before this suit was begun. Most of the cases relied upon by appellant were not in forcible detainer, but where title could be tried. Title cannot be tried in forcible detainer. *Thomas v Olenick*, 237 Ill. 167. The rule in forcible detainer is well stated in *Fortier v Ballance*, 5 Gilm. 41. The following language from *Doty v Burdick*, 23 Ill. 473, is decisive of this question.

"The exception does not, nor can it, apply to a case of this character, where the title is not in question and cannot be investigated. But few owners of real estate would be inclined to lease land if the tenant had the authority to determine whether his landlord's title was good, and legally yield possession to another, or to contest it when sued for possession, or if he were permitted to show an outstanding title and defeat a recovery. The law has, therefore, adopted as a ~~its~~ rule that, where a person enters under another, and thereby admits his title, he must restore the possession to the person from whom he received it, before he can set up title in himself or in another."

The reasons are obvious. Neither Mrs. Ambrose nor Ballance

[illegible]



nor the Gibbs Brewing Company are parties here. Appellant, who had received possession from appellee, proposed in this forcible detainer case, where right to possession only and not the title could be tried, to litigate with appellee the question whether, as between appellee and Mrs. Ambrose facts ~~had~~ had occurred which terminated the right of appellee to retain the possession of the premises, and this was to be litigated in a case where title could not be tried and where none of these parties were before the court to be bound by the decision. In our judgment it was the duty of appellant to surrender the possession to his landlord, from whom he received it. Then, if any of those other parties sought to dispute appellee's right to the possession appellee could retain possession while that question was being litigated, and would not be deprived of the possession unless it was defeated. Here the tenant proposed to defeat his landlord's possession and leave the landlord out of possession while its rights were being litigated.

The judgment is affirmed.

1. The first group of people who are not in the labor force are those who are not in the labor force because they are not in the labor force.

STATE OF ILLINOIS, }  
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate  
Court, in and for said Second District of the State of Illinois, and keeper of the Records  
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the  
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the  
seal of the said Appellate Court, at Ottawa, this second day  
of August, in the year of our Lord one thousand nine hun-  
dred and thirteen.

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*Clerk of the Appellate Court.*

11

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in  
the year of our Lord one thousand nine hundred and thirteen,  
within and for the Second District of the State of Illinois:

Present--The Hon. CHARLES WHITNEY, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. DUANE J. CARNES, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

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183 I.A. 28

BE IT REMEMBERED, that afterwards, to-wit: on the 2d day  
of August, A. D. 1913, the opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, to-wit:





Gen. No. 5806.

Elgin City Banking Co. et al.

(L. H. Grange, appellant.)

183 I.A. 23

vs

Appeal from DuPage.

Hugh E. Hancock, et al, appellees.

Dibell, J.

L. H. Grange was one of the complainants in this bill to foreclose upon certain lots in Wheaton, because he was a trustee in the instrument sought to be foreclosed. He was also the solicitor for the complainants. The owners, Hugh E. Hancock, Carrie Hancock Batchman and Frances Hancock Mossey and others, were defendants, including Jacob Glos and Emma J. Glos, his wife. Jacob Glos answered, alleging that he was the owner of the premises under a tax title paramount to said trust deed. Emma J. Glos answered, setting up that she was the owner of the premises by a tax title, paramount to said trust deed. On January 11, 1912, Glos and wife conveyed said premises to Grange. On January 15, 1912, complainants dismissed the bill as to Jacob Glos and Emma J. Glos, and on the same day there was a decree of foreclosure, which also appointed Grange receiver to collect the rents, without bond. He did collect \$48 being the rents for three months. On the 13th. of April 1912, the master filed a report showing the sale of the premises and the payment of the debt in full and the costs, including \$100 allowed to Grange as fees as solicitor for the complainants. As he was trustee and complainant, he was not entitled to an allowance for these solicitor's fees, under Gray v Robertson, 174 Ill. 244; Gentzer v Schwalts 203 Ill. 500; and Stein v Kahn 244 Ill. 32. The sale was approved, and it satisfied the debt and costs without applying the rents collected by the re-

1881 A. 23

High Court of Justice  
(L. R. 1881, 100)

A. 23, 1881

High Court of Justice

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ceiv r. On the same day Mrs. Batchman entered various motions, and among them that the receiver be discharged on the ground that there were no findings justifying the appointment of a receiver; that the debt had been paid by the sale; and that no bond had been required of the receiver. The abstract recites that this petition was dismissed, but this is a mistake. On May 1, 1912, Mrs. Batchman, in her own right and also professing to act as attorney in fact for her sister, Mrs. Mossey, quit-claimed said premises to Grange. On August 8, 1912, the receiver filed a report showing the receipt of \$45 as rent for three months and asking that he be permitted to pay this to himself as the owner of the equity of redemption. On October 7, 1912, Grange filed a petition setting up that he became the owner of the premises by the deed to him from Glos; and that he had purchased the interest, (if any they had) of Mrs. Batchman and Mrs. Mossey by the deed aforesaid, and that said rents were included in the conveyance from them to him; and the prayer of the petition was that the rents be paid to Grange. Hugh E. Hancock, Mrs. Batchman and Mrs. Mossey answered said petition and alleged that said rents, collected by the receiver, were for the months of November and December 1911, and January 1912, and that they had been in possession of the premises and of the legal title thereto to May 30, 1912, and that the rents belonged to the respondents, and that they did not agree to turn said rents over to Grange, and that said rents were not included in their conveyance or in the tax deed. Proofs were heard and there was an order allowing Grange \$15 for his compensation as receiver, and directing him to pay the remaining \$30 as follows: \$10 each to Hugh E. Hancock, Mrs. Mossey and Mrs. Batchman. From that order

only 2. On the 1st day of the month of January, 1911, the defendant was arrested at his residence at No. 1012, Broadway, New York City, and taken to the New York House of Detention, where he remained until the 10th day of January, 1911, when he was released on his own recognizance for the purpose of attending to his business. The defendant has since that time remained at his residence at No. 1012, Broadway, New York City, and has not been arrested again.

Grange prosecutes this appeal. Appellees allege a fatal defect in the manner of taking and perfecting the appeal, but we prefer to decide the case upon the merits.

The possession of the premises and the rents, issues and profits thereof after a sale on foreclosure and till the time of redemption expires belong to the owner of the equity of redemption. The sole object of a receiver in such case is to apply the rents to the payment of any deficiency left after the sale, if the mortgage or the trust deed creates a lien upon such rents. Where the sale satisfies the debt and costs, no further occasion for a receiver remains, and rents collected by a receiver and not needed to pay any deficiency cannot be applied to the payment of taxes or the ~~removal~~ removal of clouds from the title or for repairs upon the premises for the benefit of the holder of the certificate of purchase, but such rents belong exclusively to the owner of the equity of redemption. Davis v Dale 150 Ill. 339. This is the law, even where, as in this case, the mortgage or trust deed contains a provision that the rents or income of the property, accruing until the period of redemption expires, shall go to the person entitled to a deed under the certificate of sale. Schaeppi v Bartholomae, 217 Ill. 103. That provision in a trust deed becomes inoperative after a sale which satisfies the debt and costs. Therefore the receiver was really the agent of the three persons who were the owners of the equity of redemption at the time the rents accrued, who were Hugh E. Hancock, Mrs. Batchman and Mrs. Monsey, to whom the court ordered them paid.

Because Grange occupied the position of receiver and of agent for said owners, he was not at liberty to buy an outstanding title and set it up as against his princi-







pals; and, if he had acquired a perfect title by the deed from Glos to himself, he would not be permitted to deprive his principals thereof and appropriate these rents to his own use. But Glos did not have possession. His tax deed only gave him a right to bring an action to try the title to the premises. Grange offered in evidence a letter by Glos, saying that it was his understanding that by his deed to Grange he had conveyed to him his interest in the rents and profits/ This letter was incompetent as evidence and was of no effect.

The deed from Mrs. Batchman and Mrs. Mossey to Granges, made long after these rents were collected by Grange, contained no reference to the rents and did not profess to convey them. "The sale of the fee carries with it rents to fall due or that may subsequently accrue under any lease, unless reserved, but not rents already accrued." Kennedy v Kennedy 86 Ill. 180. Therefore the execution and delivery of that deed to Grange gave him no right to the rents. Grange testified that he visited Mr. and Mrs. Batchman at Dehville and that they agreed on the price at which he should have the rents and that they assigned all their right, title and interest in the rents of that property to him at that time. He did not offer in evidence any written assignment nor did he show that he had paid anything for such oral language, except what he paid for the quit claim deed. We consider that this conversation did not convey the right to these rents to Grange.

The order is affirmed.

The above is a true and correct copy of the original as shown to me by the person who produced it.

I am, Sir, very respectfully,  
Your obedient servant,  
J. H. [Signature]

STATE OF ILLINOIS, }  
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this second day of August, in the year of our Lord one thousand nine hundred and thirteen.

---

*Clerk of the Appellate Court.*



5807

211

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in  
the year of our Lord one thousand nine hundred and thirteen,  
within and for the Second District of the State of Illinois:

Present--The Hon. CHARLES WHITNEY, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. DUANE J. CARNES, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

1831.A. 24

BE IT REMEMBERED, that afterwards, to-wit: on the 2d day  
of August, A. D. 1913, the opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, to-wit:





No. 5807.

Raymond W. Stevens,

Appellee,

vs.

Wilson Carey,

Appellant.

183 I.A. 24

Appeal from Lake.

Opinion by DIBELL, J.

On April 1, 1911, appellee served upon appellant written notice to surrender and deliver up certain premises and to remove therefrom on the first day of May, 1911. Appellant did not remove, and on May 2, 1911, appellee brought this suit in forcible detainer and filed a written complaint. He had a judgment before a justice. On appeal to the circuit court there was a trial and a verdict for appellee, which was set aside. Thereafter appellee amended his complaint by adding a further description of the premises. There was another jury trial and a verdict and a judgment for appellee, from which defendant below perfected an appeal. At the next term, by leave of court, the judgment was amended. Appellant contends that the original complaint gave so indefinite a description of the premises that no jurisdiction was acquired by the justice; that the complaint could not be amended in the circuit court so as to give jurisdiction of premises not previously involved; that the judgment was void and could not be amended at the next term; that the notice to quit should have been served on the last day of March and was served on April first, after the tenancy for the

1881 A. 24

Appeal from Iowa.

Appellant,  
William Casey,  
vs.  
Appellee,  
Lawrence W. Bennett.

Opinion by Chief Justice.

On April 1, 1911, appellee served upon appellant  
written notice to withdraw and deliver up certain land-  
ses and to remove therefrom on the first day of May, 1911.  
Appellant did not remove, and on May 2, 1911, appellee  
brought this suit in federal district and filed a written  
complaint. He had a judgment before a justice. On  
appeal to the circuit court there was a trial and a verdict  
for appellee, which was set aside. Thereafter appellee  
amended his complaint by adding a further description of  
the premises. There was another jury trial and a  
verdict and a judgment for appellee, from which defendant  
below perfected an appeal. At the next term, by leave  
of court, the judgment was amended. Appellant contends  
that the original complaint gave no indication a descrip-  
tion of the premises that no jurisdiction was acquired by  
the justice, and that the complaint could not be amended in  
the circuit court so as to give jurisdiction of premises  
not previously involved; that the judgment was void and  
could not be amended at the next term; that the notice  
to quit should have been served on the last day of March  
and was served on April first, after the remedy for the

month of April had begun, and therefore it was insufficient; and also, that under the oral agreement between the parties, appellee was not entitled to possession.

In hte complaint the premises were described as follows:

"A house now occupied by Wilson Carey, and such premises as are appurtenant thereto, located on the north one-third (except that part lying east of the road) of the south half of the southwest quarter of section thirty-six, township 43 north, range 12, east of the third P. M. , in LakeCounty, Illinois."

In the circuit court the description was amended by adding thereto the following:

"Otherwise described as that piece or parcel of ground situated at the south-west corner of Green Bay road and the private drive leading westerly from said Green bay road to the residence of the plaintiff on the north one-third (except that part lying east of the road) of the south half of the south-west quarter of section thirty-six (36), township fortye three (43) north, Range twelve (12) east of the third principal meridian, and bounded by a line commencing at the point of intersection of the westerly line of said Green Bay Road with the southerly line of said private drive; running thence southerly along the westerly line of the green Bay road a distance of 2 16 feet; running thence westerly in a line parallel with the southerly line of said private drive a distance of 200 feet; running thence northerly in a line parallel with the westerly line of said Green Bay road a distance of

month of April had begun, and therefore it was inevitable  
that the parties, especially was not entitled to possession.  
In the complaint the premises were described as

"A house now occupied by Wilson Carey, and such premises as are adjacent thereto, located on the north one-third (except that part lying east of the road) of the south half of the southwest quarter of section thirty-six, township 43 north, range 12, east of the 1st P. M. in Lakota County, Dakota."

In the circuit court the description was amended by adding thereto the following:

"Otherwise described as that place or parcel of

land situated at the north-west corner of the intersection of the private drive leading westerly from said Green Bay road to the residence of the plaintiff on the north one-third (except that part lying east of the road) of the south half of the southwest quarter of section thirty-six (36), township 43 north, range 12, east of the third principal meridian, and bounded by a line commencing at the point of intersection of the westerly line of said Green Bay Road with the southerly line of said (Green Bay) road, running thence southerly along the westerly line of the Green Bay road a distance of 2 1/2 feet; running thence westerly in a line parallel with the southerly line of said (Green Bay) road a distance of 200 feet; then north westerly in a line parallel with the westerly line of said (Green Bay) road a distance of



216 feet; running thence easterly along the southerly line of said private drive a distance of 200 feet to the place of beginning."

By the last verdict the jury found defendant "guilty of unlawfully withholding the premises described in the complaint and amendment thereto." The original judgment in the circuit court was that the plaintiff have and recover of the defendant "the possession of the property in question" with costs, etc. The amendment to the judgment at the next term consisted in describing the premises pursuant to the complaint and amendment. The proof showed that appellee owned a tract of about 28 acres west of the Green Bay road in the north third of the south half of the south-west quarter of section 36 in said township and range; that he had a new house about 1000 feet back from the Green Bay road and had a private road leading to the house; that just south of that private road on said tract and just west of the Green Bay road was an old cottage or house; that appellee orally let said house to appellant; that the premises so let to him were bounded on the north by said private road, on the west by a driveway that turned off from said private road about 200 feet west of the Green Bay road; that there was a well near said old house about 216 feet south of the private road and that the premises orally leased to appellant and the premises occupied by appellant, extended no farther south than said well; and that the east boundary of the property appellant was to occupy was the Green Bay road. This was supposed to be about one acre of land and was so designated in a letter which appellant offered in

110 feet; running thence easterly along the south-  
easterly line of said private drive a distance of 200  
feet to the place of beginning."

By the last verdict the jury found defendant "guilty  
of unlawfully withholding the premises described in the  
complaint and amendment thereto." The original judge

sent in the circuit court was that the plaintiff have  
and recover of the defendant "the possession of the  
property in question" with costs, etc. The amend-

ment to the judgment at the next term contained in descrip-  
tion the premises returned to the plaintiff and amendment.

The record showed that appellee owned a tract of about  
20 acres west of the Green Bay road in the north third  
of the south half of the south-west quarter of section  
20 in said township and range; that he had a new house

about 1000 feet back from the Green Bay road and had a  
private road leading to the house; that just south of  
that private road on said tract and just west of the

Green Bay road was an old cottage or house; that the  
appellee orally let said house to appellant; that the  
appellee as let to him were bounded on the north by said

private road, on the east by a driveway that turned off  
from said private road about 200 feet west of the Green  
Bay road; that there was a well near said old house

about 210 feet south of the private road and that the  
appellee orally let to appellant and the appellee  
occupied by appellant, extended no farther south than

said well; and that the east boundary of the property  
let to appellant was the Green Bay road.

This was supposed to be about one acre of land and was  
so described in a deed which appellant received in



evidence. The description in the amended complaint and amended judgment covered no more than the lowest figures given in evidence in bounding the field.

There was a house, then occupied by appellee, on the premises, and he had never occupied any other house on said premises, and that was the house meant in the complaint and which any surveyor could find and the only uncertainty is as to what was meant by the premises "appurtenant thereto," and it would seem that when the location of the Green Bay road, the private road, the road that turns southerly from it, and the line of the well are shown, it should be clear what was described in the original complaint.

In *Atkinson v. Lester*, 1 Seam. 407, the description was: "The premises inclosed by us, situate in the county of Cook and State of Illinois, being the same on which you now reside, containing about one hundred acres of land, more or less, and commonly called North Grove." This was held a sufficient description in forcible entry and detainer. In *C. & St. L. R. R. Co. v. Wiggins Ferry Co.*, 88 Ill. 230, the description was so much of certain right of way and railroad embankment used for railroad purposes, as lies upon certain numbered lots, and also between a certain block and a certain creek. It was held that this was a sufficient description in forcible detainer. In *Haynes v. Sherwin-Williams Co.*, 126 Ill. App. 414, the premises were described as two fishing shanties situate on the banks of Lake Calumet, between two streets named, and east of a certain factory. This was held

evidence. The description in the amended complaint  
 and amended judgment covered no more than the lowest  
 figures given in evidence in bounding the field.  
 There was a house, then occupied by appellee, on the  
 west side, and he had never occupied any other house on  
 the premises, and that was the house which in the  
 amended complaint was alleged to have been occupied by  
 only one person, in the fact was made by the evidence  
 "Applicant's house," and it would seem that the  
 location of the Green Bay road, the private road, the  
 road that turns southerly from it, and the line of the  
 well are shown, it should be clear what was described  
 in the original complaint.  
 In *Atkinson v. Leeson*, 1 Conn. 407, the description  
 of the premises involved by the parties in the  
 history of 2000 and 2100 of Illinois, being the same  
 no other was made, mentioning about one hundred  
 acres of land, more or less, and southerly called North  
 2000. This was held a sufficient description in  
*Atkinson v. Leeson*, 1 Conn. 407. In *U. S. v. E. B. Co.*  
 100 U.S. 100, 101, 102, the description was  
 no more of certain right of way and railroad crossing  
 than for railroad purposes, as also those words made  
 out there, but also between a certain place and a  
 certain creek. It was held that this was a sufficient  
 description in *Atkinson v. Leeson*. In *Haynes*  
 v. *Haynes-Williams Co.*, 100 U.S. 100, 101, 102, the  
 premises were described as the fishing grounds known  
 as the ponds of Lake Umbagog, between two streams, and  
 was held a sufficient description. This was held

sufficient in forcible detainer. As to the form of the original judgment, in *Adams v. Pacini*, 119 Ill. App. 428, which was forcible entry and detainer, the judgment covered "the premises in question" and it was held that this referred to the premises described in the complaint. To the like effect is *Mollitor v. C. M. Thom Van Co.*, 118 Ill. App. 293. The amendment to the judgment shows both parties present and participating in the hearing of the motion, and, as no bill of exceptions was preserved, we must presume the proof warranted it, if the court had jurisdiction. It was held in *Hadlock v. Hadlock*, 22 Ill. 384, that a judgment in ejectment could be amended at a subsequent term, and if this amendment was necessary, it was justified. Nothing was done in making the amendment except to describe the premises pursuant to the original complaint and the amendment thereto. We are of opinion that the original complaint gave the justice jurisdiction, and that the amendment was properly permitted in the circuit court, and that the original judgment, if not sufficient to enable the clerk to prepare a writ of possession, could be amended pursuant to the complaint and amendment thereto at a subsequent term.

The oral leasing, as proved by appellee, was not that appellant would quit at the end of any rental month, upon receiving thirty days notice, but that appellant would quit at any time upon receiving thirty days notice, the reason of this being that the then owner was expecting to sell the property at any time and would want possession in thirty days thereafter. If the

entitled in favorable manner. As to the form of the original judgment, in Adams v. Smith, 119 Ill. App. 423, which was favorable entry and delivery, the judgment covered "the premises in question" and it was held that this referred to the premises described in the complaint. To the like effect in Holston v. C. M. Thompson Co., 119 Ill. App. 203. The amendment to the judgment shows both parties present and participating in the hearing of the motion, and, as no bill of exceptions was presented, we must presume the court was satisfied. It was held in Holston v. Thompson Co., 119 Ill. App. 203, that a judgment in a case could be amended at a subsequent term, and in this amendment was necessary, it was justified. Nothing was done in making the amendment except to describe the premises pursuant to the original complaint and the amendments. We are of opinion that the original complaint gave the parties jurisdiction and that the amendment was properly permitted in the circuit court, and that the original judgment, if not sufficient to enable the clerk to prepare a writ of possession, could be amended pursuant to the complaint and amendment thereto at a subsequent term. The oral hearing, as proved by exhibits, was not that appellant would quit at the end of any rental month, upon receiving thirty days notice, but that appellant would quit at any time upon receiving thirty days notice, the effect of this being that the clerk was authorized to sell the property at any time and would not possession in thirty days thereafter. If the



jury believe that the contract was as testified to by appellee's witnesses, the notice was sufficient.

Bardwell was the owner who made this oral leasing with appellant. He testified that it was a letting from month to month till he should sell the premises, and that a written lease was to be prepared before appellant took possession, but that, going to the premises some days later, he found appellant had moved in, and appellant then promised that he would prepare the written lease later, but he never did so. Appellant testified that Bardwell gave appellant the exclusive agency to sell this 2 6 acres, and offered him all he could get over \$20,000 as his compensation, and agreed that he might remain a tenant in the old house till the premises were sold, the \$20,000 collected and Bardwell's debts paid therefrom, and then for 60 days longer.

Bardwell testified and denied such an agreement but stated that some time after this oral leasing, he did authorize appellant to sell the premises as a commission of 2 ½ per cent, but that he at the same time told appellant that other agencies had the property for sale and he must not get in their way. Appellant did not sell the premises, but he contends that he is entitled to hold this property till he finds out how much it was sold for, and till the surplus, if any, over \$20,000 is paid to him, and for 60 days thereafter. This version of the oral leasing did not secure the belief of the jury or the trial judge. It was a pure question of fact and we see no ground for setting aside the conclusion of the court below.

The judgment is therefore affirmed.

they believe that the contract was as testified to by  
appellant's witnesses, the notice was insufficient.  
Hendwell was the owner who made this oral lease-  
ing with appellant. He testified that it was a leasing  
from month to month till he should sell the premises,  
and that a written lease was to be prepared before  
appellant took possession, but that, going to the  
premises some days later, he found appellant had moved  
in, and appellant then promised that he would prepare  
the written lease later, but he never did so. Appellant  
also testified that Hendwell gave appellant the exclusive  
agency to sell this 3 1/2 acres, and offered him all he  
could get over \$20,000 as his compensation, and agreed  
that he might remain a tenant in the old house till the  
premises were sold, the \$20,000 collected and Hendwell's  
debt paid therefrom, and then for \$5 days longer.  
Hendwell testified and handed such an agreement and  
stated that some time after this oral leasing, he did  
authorize appellant to sell the premises as a commission  
of 3 1/2 per cent, but that he at the same time told  
appellant that other agencies had the property for sale  
and he was not out in their way.  
Appellant did not  
sell the premises, but he contends that he is entitled  
to hold this property till he finds out how much it will  
sell for, and till the mortgage, is any, over \$20,000 is  
paid to him, and for 30 days thereafter. This was  
one of the facts leading him and others to believe at the  
time of the trial judge. It was a pure question of  
fact and we see no ground for setting aside the conclu-  
sion of the court below.

The judgment is therefore affirmed.



STATE OF ILLINOIS, }  
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate  
Court, in and for said Second District of the State of Illinois, and keeper of the Records  
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the  
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the  
seal of the said Appellate Court, at Ottawa, this second day  
of August, in the year of our Lord one thousand nine hun-  
dred and thirteen.

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*Clerk of the Appellate Court.*



5810

212

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in  
the year of our Lord one thousand nine hundred and thirteen,  
within and for the Second District of the State of Illinois:

Present--The Hon. CHARLES WHITNEY, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. DUANE J. CARNES, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

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183 I.A. 25

BE IT REMEMBERED, that afterwards, to-wit: on the 2d day  
of August, A. D. 1913, the opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, to-wit:



Gen. No. 5810

L. R. Green, appellant.

1831.A. 25

vs

Appeal from Peoria.

Fred E. Streitmatter, appellee.

Dibell, J.

As appellant was driving north with a horse and surrey on a certain highway in Peoria County, appellee was driving an automobile south on the same highway. The automobile and the horse collided, the surrey was overturned and appellant and his horse and his surrey were injured. He brought this suit to recover damages from appellee for said injuries. The injury occurred on September 4, 1910, and was governed by the act of 1907, as amended in 1909, and not by the present statute. The first count of the declaration charged that appellee was driving his machine in excess of twenty miles per hour; that appellants horse was frightened at the approach thereof and exhibited said fright by his actions, so that appellee could have noticed it; that appellee did not decrease his speed and gave none of the road to appellant, and struck the horse and committed these injuries. The second count charged that the horse became frightened and appellee did not bring his vehicle to a full stop, but struck the horse and carriage. The third count charged that appellee drove the automobile at a speed in excess of twenty miles per hour, without stopping and without turning out from the travelled road, though appellant's horse was frightened and exhibited said fright in a manner apparent to appellee and, in consequence of appellee's said neglect the machine struck the carriage and caused the injuries. There was a jury trial and a verdict for appellee. A motion by appellant for a new trial was denied and there was a judgment against him for costs, from which he appeals.

1881.A.25

Nov. 10, 1881

Dr. J. H. Brown

Amherst, Mass.

Dear Sir,

I have the honor

to acknowledge the receipt of your letter of the 10th inst.

and in reply to inform you that the same has been forwarded

to the proper authorities for their consideration.

I am, Sir, very respectfully,

Yours very truly,

J. H. Brown

The Adjutant General of the Army

Washington, D. C.

P. S. The letter of the 10th inst. has been forwarded

to the proper authorities for their consideration.

I am, Sir, very respectfully,

Yours very truly,

J. H. Brown

The Adjutant General of the Army

Washington, D. C.

P. S. The letter of the 10th inst. has been forwarded

to the proper authorities for their consideration.

I am, Sir, very respectfully,

Yours very truly,

J. H. Brown

The Adjutant General of the Army

Washington, D. C.

P. S. The letter of the 10th inst. has been forwarded

to the proper authorities for their consideration.

I am, Sir, very respectfully,

Yours very truly,

J. H. Brown

The Adjutant General of the Army

Washington, D. C.



2

The bill of exceptions does not contain an exception to the overruling of the motion for a new trial and appellee contends that most of the questions argued are therefore not presented for consideration. This was formerly the law, but this case was tried in December 1912 and under Section 81 of the Practice Act, as amended in 1911, no exception was necessary.

Appellant's main contention is that he established his cause of action by a clear preponderance of the evidence and that the verdict against him is unjust. We have carefully considered the testimony. According to what introduced by appellant, appellee was driving his automobile at thirty miles per hour and kept in the beaten path and did not check his speed, although appellants horse was frightened at the approach of the machine, so that any one who looked could see it. According to the evidence introduced by appellee he was running eighteen miles per hour as he approached appellant and he turned to the right entirely out of the beaten path and upon the grass and weeds and reduced his speed to twelve miles per hour and the horse showed no signs of fright, till suddenly appellee's horse wheeled to the left and sprang directly towards the west side of the road so that his head and shoulders came just in front of the wing shield. If the account given by the witnesses for appellee was correct appellee was not liable. There were quite a number of eye witnesses. It was peculiarly a question for the jury to determine what the facts really were. Their conclusion upon the facts, approved by the trial judge, cannot be disturbed here.

Appellant complains of the refusal of certain instructions. One of them submitted to the jury the question whether



appellee gave reasonable warning of his approach. This was properly refused, because no issue of that kind was presented by the declaration. Another instruction requested by appellant was properly refused because it submitted the question whether appellee kept a proper lookout, and that issue was not submitted by the declaration. Another refused instruction was embodied in those which were given. The court refused one instruction on the measure of damages. Another instruction was given on that subject and, as the verdict was against appellant, it is immaterial whether the instruction in question should have been given. Several instructions, given for appellee, submitted the question whether appellant was in the exercise of due care or was guilty of contributory negligence. In *Christy v Elliott* 210 Ill. 31 - 47, an instruction was approved in such a case which required plaintiff to exercise reasonable care, and we are of opinion that he was bound to prove that he was exercising due care, notwithstanding the declaration contained no such averment. We regard that as a material allegation, and that its omission did not excuse failure to prove it. *City of East Dubuque v Burhyte*, 74 Ill. App. 99, 173 Ill. 583. It is urged that there was no evidence that appellant was guilty of contributory negligence. Appellant testified that he was driving the horse, and that, before the automobile reached him, he saw that the horse was frightened at its approach. The horse did suddenly wheel and swerve to the left. It was proper to submit to the jury the question whether appellant held the reins sufficiently tight, and whether, if he had exercised due care, he could have prevented this movement of the horse. In testifying he admitted that, if his horse had not suddenly wheeled and sprang to the left,

[illegible]

the collision would not have occurred. We find no reversible error in the record and the judgment is therefore affirmed.





STATE OF ILLINOIS, } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate  
SECOND DISTRICT. Court, in and for said Second District of the State of Illinois, and keeper of the Records  
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the  
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the  
seal of the said Appellate Court, at Ottawa, this second day  
of August, in the year of our Lord one thousand nine hun-  
dred and thirteen.

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*Clerk of the Appellate Court.*



Carnes. J.

5777

215

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and thirteen, within and for the Second District of the State of Illinois:

Present--The Hon. CHARLES WHITNEY, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. DUANE J. CARNES, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

183 I.A. 34

BE IT REMEMBERED, that afterwards, to-wit: on the <sup>47</sup> day of August, A. D. 1913, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:



Gen. No. 5777.

188 I.A. 34

Louis Sabo, appellee

vs

Appeal from City Ct. Aurora.

Aurora, Elgin & Chicago Railroad Company. appellant.

Carnes, J.

A appellee Louis Sabo, accompanied by his son, about fifteen years old, was driving a milk wagon south on the west side of South Lake Street in the city of Aurora about noon on December 10th, 1911. He was familiar with the location. The street was about forty feet wide and appellants Street Railway track entered it at the north and was in about the center of the street. When eight or nine hundred feet south of the place where the track enters the street, appellee, who had been driving on a trot, slackened his horse to a walk and turned to cross the street and track, to a driveway on the east side that led to a creamery. One of appellants cars approaching from the north struck his wagon while on the track throwing appellee and his son to the ground. There was some damage to the wagon costing eighteen or twenty dollars to repair, and appellee received some, but probably not serious or permanent injuries from the fall. This action is brought to recover for such damage and resulted in a verdict and judgment of \$500.

There is no evidence that the car was running at an unusual or excessive rate of speed, or that there was any defect in the appliances for stopping the car, or that the servants of appellant were negligent or careless in controlling or stopping the car after appellee turned to cross the track. The claim is that the motorman should have got his car under control when he saw appellee driving parallel with the track, and should have anticipated that the driver

1881 A. 34

Amesbury, Mass. 1881

Amesbury, Mass. 1881  
Amesbury, Mass. 1881

A police Louis Babo, accompanied by his son, about  
fifteen years old, was driving a milk wagon south on the west  
side of South Lake Street in the city of Amesbury about noon on  
December 10th, 1881. He was familiar with the location. The  
street was about forty feet wide and approximately Street Railway  
crossed it at the north end and was in about the center of  
the street. When eight or nine hundred feet south of the place  
where the track crosses the street, the driver, who had been  
driving on a trot, slackened his horse to a walk and turned to  
the right and struck the track, to a driveway on the east side  
which led to a crossway. One of the applicants was approaching  
from the north struck his horse while on the track following  
the driver and his son to the ground. There was some damage to  
the wagon costing eighteen or twenty dollars to repair, and  
the driver received some, but probably not serious or permanent  
injuries from the fall. This action is brought to recover for  
such damage and resulted in a verdict of \$200.  
There is no evidence that the car was running at an  
unnatural or excessive rate of speed, or that there was any  
negligence on the applicant's part for stopping the car, or that the  
negligence of applicant were negligent or careless in controlling  
the car after applicant turned to cross  
the street. The claim is that the defendant should have got  
the car under control when he saw applicant driving rapidly  
towards the street, and should have anticipated that the driver



of a milk wagon might turn into the driveway leading to the creamery, which it appears was sometimes visited by drivers of such vehicles; and that the motorman gave no signal before appellee started to turn, and should have signalled before that time. And that appellee was in the exercise of due care in attempting to cross the tracks without looking to see whether there was a car approaching. It is shown by the evidence, and admitted in the argument, that appellee did not look at that time and had not looked north for two minutes, and that two minutes of 60 seconds each is meant, and not the careless estimate of time so often unthinkingly expressed in minutes, and that there was a clear view for the whole distance of eight or nine hundred feet to the point where the car entered the street.

The car was running seven or eight miles an hour before appellee turned, and slackened speed after that so that it was running much slower when it struck the wagon - but was so near the wagon when it first turned that the collision could not be avoided. There was nothing in the location of the creamery at the point in question to notify the motorman that a pellee would certainly or probably drive in there. He might be presumed more likely to turn there than the driver of a grocery or express wagon; either might or might not do so. The law is so well settled that the driver of a street car is not bound, in the absence of any thing to warn him, to assume that the driver of a vehicle will turn and cross the tracks ahead of him that it is hardly necessary to cite authorities. *Rack v Chicago City Ry. Co.* 173 Ill. 289 is among the earlier and *Chicago & Union Traction Company v Browdy* 206 Ill. 413 among the later cases so holding. It is matter of common knowledge that cars could not be run on the streets of our cities on that

of a milk wagon might turn into the driveway leading to the  
cremery. When it was was sometimes visited by drivers  
of such vehicles; and that the motor man gave no signal before  
appealing started to turn, and should have signalled before  
that time. And that appellee was in the exercise of due care  
in attempting to cross the tracks without looking to see whether  
there was a car approaching. It is shown by the evidence, and  
admitted in the argument, that appellee did not look at that  
time and had not looked north for two minutes, and that  
two minutes of 60 seconds each is meant, and not the careless  
estimate of time so often negligently expressed in minutes,  
and that there was a clear view for the whole distance of eight  
or nine hundred feet to the point where the car entered the  
street.

The car was running seven or eight miles an hour before  
appellee turned, and appellant turned after that time and was  
running much slower when it struck the wagon - but was so near  
the wagon when it first turned that the collision could not  
be avoided. There was nothing in the location of the cremery  
at the point in question to notify the motor man that a police  
wagon would certainly or probably drive in there. He might be pre-  
sumed more likely to turn there than the driver of a grocery  
or express wagon; either might or might not do so. The law  
is so well settled that the driver of a street car is not bound  
in the absence of any thing to warn him, to assume that the  
driver of a vehicle will turn and cross the tracks ahead of  
him that it is hardly necessary to cite authorities. Rank v  
Chicago City Ry. Co., 173 Ill. 383 is among the earlier and  
Chicago & Western Traction Company v Browdy, 308 Ill. 613 among  
the later cases so holding. It is matter of common knowledge  
that there would not be any on the streets of Chicago at that

assumption. Prudence may or may not require that a signal should be given on approaching a vehicle from the rear, depending on the condition of travel at the time; and the great preponderance of the evidence shows that in this case the gong was sounded before appellee started to turn. We do not see how appellant can be charged with negligence in approaching the car or colliding with it in the manner shown by the evidence.

But it seems clear that appellee was ~~at~~ not at the time himself in the exercise of ordinary care for his own safety. He had been driving over that street frequently for three years; appellant had been operating its cars there all that time; it was midday and a car might be expected at any time, there was nothing to distract appellee's attention. He says he looked north two minutes before the collision and saw no car. Time enough elapsed for the car to come upon the street and reach him, when without looking, and without excuse for not looking he drove upon the track.

The measure of ordinary care is to be applied to appellee as well as to appellant, and we cannot see how any reasonable mind can reach the conclusion under these circumstances that appellee measured up to that standard and appellant did not. In our opinion the record fails to show either negligence of appellant or ordinary care of appellee. It is therefore unnecessary to consider other errors assigned.

The judgment is therefore reversed.

#### Finding of Facts:

We find that appellee was guilty of negligence which contributed to the injury, and, that, appellant was not guilty of negligence.

...ion. Prudence may or may not require that a signal should be given on approaching a vehicle from the rear, depending on the condition of travel at the time; and this great responsibility of the defendant shows that he did not use due care before the collision started to turn. He did not see the car colliding with it in the manner shown by the evidence.

But it seems clear that appellee was not at the time himself in the exercise of ordinary care for his own safety. He had been driving over that street frequently for many years, and he was not at that time; it was midday and a car might be expected at any time, there was nothing to distract appellee's attention. He says he looked north two minutes before the collision and saw no car. Time enough elapsed for the car to come upon the street and reach him, when without looking, and without reason for not looking, he drove upon the track.

The measure of ordinary care is to be applied to appellee as well as to appellant, and we cannot see how any reasonable man can reach the conclusion under these circumstances that appellee measured up to that standard and appellant did not. It is again the record fails to show either negligence of appellant or ordinary care of appellee. It is therefore unnecessary to consider other errors assigned.

The judgment is therefore reversed.

THE COURT OF THE STATE

It is the duty of appellee to exercise due care and to avoid collisions, and, that, appellant was not guilty of negligence.

STATE OF ILLINOIS, }  
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate  
Court, in and for said Second District of the State of Illinois, and keeper of the Records  
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the  
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the  
seal of the said Appellate Court, at Ottawa, this second day  
of August, in the year of our Lord one thousand nine hun-  
dred and thirteen.

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*Clerk of the Appellate Court.*





5785

216

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in  
the year of our Lord one thousand nine hundred and thirteen,  
within and for the Second District of the State of Illinois:

Present--The Hon. CHARLES WHITNEY, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

✓ Hon. DUANE J. CARNES, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

183 I.A. 35

BE IT REMEMBERED, that afterwards, to-wit: on the <sup>17</sup> day  
<sup>Oct</sup> of August, A. D. 1913, the opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, to-wit:



No. 5785

Nicholas G. Heinz,

Appellant.

vs

Peoria Life Insurance Co.,

Appellee,

183 I.A. 35  
Appeal from Peoria.

Opinion by CARNES J.

The trial court directed a verdict for the defendant at the close of the plaintiff's evidence. Treating as proven all that the evidence fairly tended to prove, the facts may be stated as follows. An agent of the appellee insurance Company on February 2nd, 1911, induced the appellant Nicholas G. Heinz, to sign a written application for an \$5000 policy in that Company, with an annual premium of \$164.45, by orally representing to him that the policy would have a surrender value of \$5000 at the end of sixteen years, and secured appellants promissory note for the amount of the first premium. The policy was issued and delivered at appellant's home some time in the month of February, but because of his absence he did not see it until the last Sunday in April, when he read it and put it away. The policy did not promise a surrender value of \$5000 at the end of sixteen years, but did provide for that amount of paid up insurance under certain conditions at the end of that period; and also on its face warned the holder that the Company would not be bound by any promise or representation unless made in writing by one of its officers there named.

Appellant did not understand that the provisions of the

No. 8785

Nicholas G. Weiss,

Appellant.

vs

Georgia Life Insurance Co.,

Appellee.

1881 A. 35  
Appeal from Georgia.

Opinion by GARNER J.

The trial court directed a verdict for the defendant at the close of the plaintiff's evidence. Treating as proven all that the evidence fairly tended to prove, the facts may be stated as follows. An agent of the appellee Insurance Company on February 2nd, 1881, induced the appellant Nicholas G. Weiss, to sign a written application for an \$5000 policy in that Company, with an annual premium of \$184.45, by orally representing to him that the policy would have a surrender value of \$5000 at the end of sixteen years, and secured appellant's promissory note for the amount of the first premium. The policy was issued and delivered at appellant's home some time in the month of February, but because of his absence he did not see it until the last Sunday in April, when he read it and put it away. The policy did not promise a surrender value of \$5000 at the end of sixteen years, but did provide for that amount of paid up insurance under certain conditions at the end of that period; and also on its face warned the holder that the Company would not be bound by any promise or representation unless made in writing by one of its officers there named.

Appellant did not understand that the provisions of the

policy were not as represented by the agent until July 9th following, when his attention was called to it by the agent of another Company. He elected to rescind the policy and on August 2nd, demanded the return of his note and offered to return the policy. Appellee refused and on August 10th, 1911, this suit was begun before a Justice of the Peace and was afterwards tried on appeal, in the circuit court, resulting in a judgment against the plaintiff, from which this appeal is taken. Appellant tried the case on the theory that the policy was voidable because obtained in violation of Section 208 n. chapter 73, of Hurd's Revised Statutes of 1911, which with the following section reads as follows, "That no life insurance company doing business in this State and no officer, director or agent thereof shall issue or circulate, or cause or permit to be issued or circulated, any estimate, illustration, circular or statement of any sort misrepresenting the terms of any policy issued by it or the benefits or advantages promised thereby, or the dividends or shares of surplus to be received thereon, or shall use any name or title of any policy or class of policies misrepresenting the true nature thereof.

Any company or individual violating any of the provisions of this act shall be subject to a penalty of not less than twenty-fivedollars nor more than five hundred dollars, to be recovered in any court having jurisdiction thereof in any action brought in the name of the People of the State of Illinois by the attorney general, insurance superintendent or State's attorney of the county in which



policy were not as represented by the agent until July 28th following, when his attention was called to it by the agent of another company. He elected to rescind the policy and on August 2nd, demanded the return of his note and offered to return the policy. Appellee refused and on August 10th, 1911, this suit was begun before a Justice of the Peace and was afterwards tried on appeal, in the circuit court, resulting in a judgment against the plaintiff, from which this appeal is taken. Appellant tried the case on the theory that the policy was voidable because obtained in violation of Sec. on 306 N. Chapter 73, of Illinois "revised Statutes of 1911, which with the following section reads as follows, "that no life insurance company doing business in this State and no officer, director or agent thereof shall issue or circulate, or cause or permit to be issued or circulated, any estimate, illustration, circular or statement of any sort representing the terms of any policy issued by it or the benefits or advantages promised thereby, or the dividends or shares of surplus to be received thereon, or shall use any name or title of any policy or class of policies misrepresenting the true nature thereof. Any company or individual violating any of the provisions of this act shall be subject to a penalty of not less than twenty-five dollars nor more than five hundred dollars, to be recovered in any court having jurisdiction thereof in any action brought in the name of the People of the State of Illinois by the attorney general, insurance superintendent or State's attorney of the county in which



such violation occurs, said penalty when recovered to be paid into the county treasury of the county in which such recovery is had." And argued that independent of that statute the contract of insurance was obtained by false and fraudulent representations and is for that reason voidable, and that in either view he is entitled to recover the full amount of the note.

We are of the opinion that the statute does not include oral statements. The words "issue or circulate" as generally understood imply written or printed matter. We are urged by appellant to consider the purpose of the act in the light of common understanding of existing conditions; and it seems to us in that view of the subject, reasonable to presume that the Legislature had in view circulars and written statements issued by insurance companies misrepresenting the benefits and advantages promised by their policies and unreasonable to presume that it was charging the attorney general and other public officers named, with the duty of prosecuting enthusiastic and voluble sales agents wittingly or unwittingly orally misrepresenting the goods.

It may be practicable to control by law the written advertising matter of a business, it is or should be prepared with care, and subject to inspection and review by persons in authority; but the persuasive salesman in a running conversation with the buyer, can hardly be expected at all times to reach accuracy of statement, and the public is schooled to the fact that he will not understate the benefits and advantages of purchasing his wares. And if,

such violation occurs, said penalty when recovered to be paid into the county treasury of the county in which such recovery is had." And argued that independent of that statute the contract of insurance was obtained by false and fraudulent representations and is for that reason voidable, and that in either case he is entitled to recover the full amount of the note.

We are of the opinion that the statute does not include oral statements. The words "issue or circulate" as here used are understood to imply written or printed matter. We are

urged by appellant to consider the purpose of the act in the light of common understanding of existing conditions, and it seems to us in that view of the subject, reasonable

to presume that the Legislature had in view situations and existing statements issued by insurance companies misrepresenting the benefits and advantages promised by their policies

and unreasonable to presume that it was charging the attorney general and other public officers named, with the duty of prosecuting enthusiastic and voluble sales agents withholding or unduly orally misrepresenting the goods.

It may be possible to control by law the written advertising matter of a business, it is or should be prepared with care, and subject to inspection and review by persons in authority; but the persuasive element in a running conversation with the buyer, can hardly be expected at all times to reach accuracy of statement, and the public is schooled to the fact that he will not understate the benefits and advantages of purchasing his wares. And it,

as appellant claims, the effect of such misrepresentation be to enable the insured to rescind the contract and recover all the premium paid, months or years after the transaction, when he discovers that the meaning of his contract is not what he understood the agent to say, the legislature may be presumed not to intend to open the door for litigation of the validity of written contracts based on that kind of oral testimony.

The other question is whether the policy was obtained by fraudulent representations that would entitle appellant in the absence of the statute to a judgment. There is no proof of the value of the policy issued or of a policy such as was promised, therefore no ground for substantial damages based on the difference in value of the thing sold and the thing received. It is not clear whether the representation of the agent was as to the terms or the value of the policy to be delivered. If the latter we see no ground for recovery, as it would be a mere expression of opinion or trade talk. But assume the policy delivered was so different from the policy represented, that appellant had the option to receive or reject it. He was bound to notify the company within a reasonable time of his election to disaffirm the contract, *Sutter v. Rose*, 169 Ill., 66; *Stackpole v. Schuck*, 225 Ill., 503; *Morey v. Pierce*, 14 Ill. App., 91; and the facts being undisputed, the question of reasonable time was one of law for the court, *C. R. I. & P. R. R. Co. v. Boyce*, 73 Ill., 510; *Loeb v. Stern*, 198 Ill., 371;

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the validity of written contracts based on that kind of oral  
testimony.

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he was promised, therefore no ground for substantial damages  
based on the difference in value of the thing sold and the  
thing received. It is not clear whether the representation  
of the agent was as to the terms or the value of the policy  
to be delivered. At the latter we see no ground for  
recovery, as it would be a mere expression of opinion or trade  
talk. But assuming the policy delivered was so different  
from the policy represented, that appellant had the option  
to receive or reject it. He was bound to notify the company  
within a reasonable time of his election to disaffirm the  
contract, *Miller v. Rose*, 188 Ill., 60; *Stachpole v. Schmeckel*,  
188 Ill., 502; *Worley v. [unclear]*, 18 Ill. App., 51; and the  
facts being undisputed, the question of reasonable time was  
one of law for the court, *D. E. I. & P. R. Co. v. Boyce*, 73  
Ill., 510; *Loeb v. Stern*, 188 Ill., 371.



Appellant read his policy the last Sunday in April. If we assume that he has sufficient intelligence to understand, remember and state the oral representation of the agent, and his case rests entirely on his statement of what the agent said, we must assume that he should have understood that the contract was for a paid up policy of \$5000, instead of a surrender value of that amount, and he must be charged with knowledge of that fact at that time. He gave no notice to the company of his election to disaffirm till August 2nd, more than three months after he first read the policy, meantime enjoying the protection afforded by the insurance. We are of the opinion that he failed to act in the matter within a reasonable time and therefore the contract must be treated as affirmed by him.

It is objected that appellant was required by the court to file a bill of particulars. He did so without objecting and was permitted during the trial to file an amended bill. We do not see that he was precluded from offering any competent evidence by any restriction in his bill of particulars. If the court erred in that ruling and we do not think he did, appellant can not here complain.

We find nothing in the evidence heard or offered, entitling appellant to a substantial judgment in this case, therefore the judgment of the trial court is affirmed.

Appellant read his policy the last Sunday in April. It was  
known that he had sufficient intelligence to understand,  
remember and state the oral representation of the agent,  
and his case rests entirely on his statement of what the  
agent said, and what amount that he should have understood  
that the contract was for a paid up policy of \$5000, instead  
of a surrender value of that amount, and he must be charged  
with knowledge of that fact at that time. He gave no  
notice to the company of his election to discontinue until  
August and, more than three months after he first read the  
policy, meantime enjoying the protection afforded by the  
insurance. We are of the opinion that he failed to act in  
the matter within a reasonable time and therefore the contract  
must be treated as affirmed by him.  
It is objected that appellant was required by the contract  
to file a bill of particulars. He did so without objecting  
and was permitted during the trial to file an amended bill.  
We do not see that he was precluded from offering any com-  
petent evidence by any restriction in the bill of particulars.  
It is contended that appellant was not doing as he said,  
appellant can not here complain.  
We find nothing in the evidence heard or offered, ex-  
cusing appellant to a substantial judgment in this case,  
therefore the judgment of the trial court is affirmed.



STATE OF ILLINOIS, }  
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate  
Court, in and for said Second District of the State of Illinois, and keeper of the Records  
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the  
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the  
seal of the said Appellate Court, at Ottawa, this second day  
of August, in the year of our Lord one thousand nine hun-  
dred and thirteen.

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*Clerk of the Appellate Court.*



## AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of  
October, in the year of our Lord one thousand nine hundred  
and thirteen, within and for the Second District of the  
State of Illinois:

Present -- The Hon. CHARLES WHITNEY, Presiding Justice.

Hon. DORRANCE DIBELL, Justice

Hon. DUANE J. CARNES, Justice

CHRISTOPHER C. DUFFY, Clerk

J. G. MISCHKE, Sheriff

183 I.A. 49

BE IT REMEMBERED, That afterwards, to-wit: On the 17th  
day of October, A.D. 1913, the opinion of the Court was filed  
in the Clerk's office of said Court, in the words and figures  
following, to-wit:



5797

101

Appellant.

183 I.A. 49

Appeal from Henderson.

Citizens State Bank of Herscher

vs. Geo. E. Lee,

Appellee.

Appellee Citizens State Bank of Henderson obtained a

judgment against Geo. E. Lee, Sheriff of Henderson, for \$1000.

First appellant Philip H. Lee, on a writ of habeas corpus, obtained

an order on the 22d, 1906, signed by appellant Lee, for the sheriff to

release from custody of \$1000 with interest at 6%, two hundred dollars

attorneys fees. Appellant Lee, in the same order, directed

the sheriff to serve and a return made of the sheriff to the

county clerk. Appellant Lee, in the same order, directed

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county clerk. Appellant Lee, in the same order, directed

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county clerk. Appellant Lee, in the same order, directed

the sheriff to serve and a return made of the sheriff to the













5813

221

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in  
the year of our Lord one thousand nine hundred and thirteen,  
within and for the Second District of the State of Illinois:

Present--The Hon. CHARLES WHITNEY, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

✓ Hon. DUANE J. CARNES, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

183 I.A. 53

BE IT REMEMBERED, that afterwards, to-wit: on the <sup>17</sup> day  
of ~~August~~ <sup>Oct</sup>, A. D. 1913, the opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, to-wit:





Gen. No. 5813.

O. P. Mills, appellee.

183 I.A. 53

vs

Appeal from Co. Ct. LaSalle

C. & N. W. Ry. Co. appellant.

Carnes, J.

This is an action in trover brought by appellee Mills against the appellant Railway Company to recover the value of 101 small hogs, known as feeding hogs, delivered by appellee to appellant for shipment from Pulaski, Wisconsin, to McNabb, Illinois; resulting in the court below in a verdict and judgment of \$259 against appellant.

The facts as admitted, or proven, are that at the time of shipment appellee directed the agent of appellant to transfer the hogs to the Chicago, Milwaukee & St. Paul Road as soon as possible, and that meant at Green Bay, Wisconsin, and not to carry them into Chicago; that it was practical to ship them by the route so directed; that appellant did not follow these instructions but shipped the hogs to Chicago and delivered them to the Stock Yards. There was a Government regulation which forbid hogs being shipped from the Stock Yards for feeding purposes, and being thus prevented from transferring the hogs appellant turned them over to a commission merchant who sold them as butcher stock and turned the net proceeds of the sale over to appellee, who received the same as a part settlement of his claim. The sale in Chicago was for the market value of the hogs as butcher stock and for less than their value there as feeders, if the shipment of feeders had not been so prohibited. The market value at McNabb was sufficiently in excess of the amount received to sustain the verdict if that value be taken as a basis of recovery. The shipping contract contained a stipulation that

1831.A.58

A report from Co. St. Louis

Gen. No. 3215.

O. P. Miller, examiner.

vs

C. & W. W. Ry. Co. respondents.

Grimes, J.

This is an action in trover brought by respondents Miller against the appellant Railway Company to recover the value of 101 small hogs, known as feeding hogs, delivered by respondents appellant for shipment from Oshkosh, Wisconsin, to Kenosha, Illinois; resulting in the court below in a verdict and judgment of \$250 against appellant.

The facts as admitted, or proven, are that at the time of shipment respondents directed the agent of respondents to transfer the hogs to the Chicago, Milwaukee & St. Paul Road as soon as possible, and that agent at Green Bay, Wisconsin, and not to carry them into Chicago; that it was practical to ship them by the route as directed; that appellant did not follow these instructions but shipped the hogs to Chicago and delivered them to the Stock Yards. There was a diversion of respondents which forbids respondents from the St. Louis lands for feeding purposes, and being there prevented from transferring the hogs respondents turned them over to a certain alien merchant who sold them as butcher stock and turned the net proceeds of the sale over to appellant, who received the same as a part settlement of his claim. The sale in Chicago was at the market value of the hogs as butcher stock and not less than their value as feeders, if the shipment of feeders had not been so prohibited. The market value at Kenosha was sufficiently in excess of the amount received to sustain the verdict if that value be taken as a basis of recovery. The shipping contract contained a stipulation that

in case of accident, resulting in injury to said animals, the value thereof shall in no case exceed the declared valuation by the shipper and that the carrier's liability was limited to the declared valuation which was "each hog \$10.00"

The trial court adopted the theory that the market price at McNabb governed.

Appellant contends (1) that there was no conversion, that at most it was only guilty of a breach of contract in shipping the hogs to Chicago, therefore trover was not the proper action; (2) that if there was a conversion it occurred in Chicago and the measure of damages is the market value at that place, which appellee had already received, and that the court erred in refusing to exclude evidence of market value at McNabb; (3) that its liability is limited by the shipping contract to the amount there stated which would leave \$69.34 as the limit of recovery.

Trover was the proper form of action; I. & St. L. R. R. Co. v Herndon, 81. Ill. 143.

The measure of damages was the market value of the hogs at McNabb at the time when they should have been delivered there; C. & N. W. R. R. Co. v Dickinson, 74 Ill. 249; C. C. C. & St. L. Ry. Co. v Patton, 203 Ill. 376. There is an instructive note on this question in L. N. S. Vol. 15, page 1126, in which the authorities are collected and discussed. While the general rule is that in case of conversion the measure of damages is the market value of the goods at the time and place of conversion, there is a recognized exception in cases against common carriers. It would be manifestly unjust to force the shipper to accept the market value of goods at a point on the route where such value was less than at the place of destination.

in case of accident, resulting in injury to said animal, the value thereof shall be no less than the value of the animal at the time of the accident, and the carrier's liability was limited by the Chicago and North Western Railway Company to the value of the animal at the time of the accident, which was \$10.00.

The trial court adopted the theory that the market price at Chicago prevailed.

Appellant contends (1) that there was no conversation, and at most it was only a breach of contract in shipping goods to Chicago, then from there to the proper place, and that if there was a conversation it occurred in Chicago and the measure of damages is the market value at that place, which appellee had already received, and that the court erred in refusing to exclude evidence of market value at Chicago; (2) that the liability is limited by the shipping contract to the amount there stated which would leave \$50.00 as the limit of recovery.

There was the proper tort action; I. & St. N. R. Co. v. Harrison, 81 Ill. 143.

The measure of damages was the market value of the goods at the time when they should have been delivered there; C. & N. W. R. Co. v. Dickinson, 74 Ill. 342; C. & St. N. R. Co. v. Patton, 203 Ill. 375. There is an instructive note on this question in L. R. Vol. 18, page 1135, in which the authorities are collected and discussed. While the general rule is that in case of conversation the measure of damages is the market value of the goods at the time and place of conversation, there is a recognized exception in cases against common carriers. It would be manifestly unjust to force the shipper to accept the market value of goods at a point on the route where such value was less than at the place of destination.

We do not regard the limitation of liability in the shipping contract as controlling in this case. The purpose of that stipulation was to provide for cases of accidental injury. It was not an option to the carrier to convert the property at will and settle for the amount named. The limitation of liability was not binding on appellee without his assent. There is no evidence showing such assent except the paper bears his signature. It would seem under the authority of *Wabash R. R. Co. v Thomas*, 222 Ill. 337, that he should not be held bound by the stipulation, even if it covered the loss in question.

Appellant argues that the verdict is excessive, but under our views of the law here expressed it is not materially excessive on any computation suggested. There was a written motion for a new trial and it is not there suggested that the verdict is excessive, therefore that question cannot be here raised, except as it arises in rulings on the instructions and evidence; *Yarber v Chicago & Alton Ry. Co.* 235 Ill 589; and in so far as it there arises it is answered in the foregoing discussion of the case.

The judgment is affirmed.



We do not regard the limitation of liability in the ship-  
ping contract as controlling in this case. The purpose of  
that stipulation was to provide for cases of accidental  
injury. It was not an option to the carrier to prevent the  
property of will and settle for the money owed. The li-  
mitation of liability was not binding on shippers without the  
assent. There is no evidence that such assent existed in  
this case. It would seem under the authority  
of *Wabash R. R. Co. v. Thomas*, 233 Ill. 337, that it should  
not be held bound by the stipulation, even if it covered the  
loss in question.

Appellant argues that the verdict is excessive, but admits  
our views of the law have been expressed. It is not necessary  
to state the reasons for the verdict. There was a question  
of fact and the jury was entitled to find as it saw fit.

The verdict is excessive, therefore, that question cannot be  
raised, except as to cases in which the law is involved.  
There is no evidence; *Yarber v. Chicago & Alton Ry. Co.*, 233 Ill.  
338; and in no case is there evidence it is answered in the  
affirmative of the case.

The judgment is affirmed.



STATE OF ILLINOIS, }  
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate  
Court, in and for said Second District of the State of Illinois, and keeper of the Records  
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the  
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the  
seal of the said Appellate Court, at Ottawa, this second day  
of August, in the year of our Lord one thousand nine hun-  
dred and thirteen.

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*Clerk of the Appellate Court.*

1875

5814

222

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in  
the year of our Lord one thousand nine hundred and thirteen,  
within and for the Second District of the State of Illinois:

Present--The Hon. CHARLES WHITNEY, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

✓ Hon. DUANE J. CARNES, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

183 I.A. 55

BE IT REMEMBERED, that afterwards, to-wit: on the <sup>17</sup>~~2d~~ day  
of ~~August~~ <sup>Oct</sup>, A. D. 1913, the opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, to-wit:



Gen. No. 5814.

Lulu King, appellee.

vs

183 I.A. 55

Appeal from Ill.

Chicago & Joliet Electric

Railway Company. appellant.

Carnes, J.

Appellee Lulu King, was, with another woman, driving south on a public highway on which the tracks of appellant Chicago & Joliet Electric Railway Company, are located. As she was approaching or upon a culvert and narrow part of the said highway, one of appellants cars running north, came over a slight elevation about 700 feet south of the culvert. At about the time the car and vehicle met, the horse driven by appellee took fright and went off the road into a gully below, overturning the carriage resulting in breaking the collar bone of appellant and otherwise quite seriously, but probably not permanently, injuring her. This action is brought to recover for that injury and there was a verdict and judgment of \$400.

Appellants counsel does not argue that there was any error of law in the conduct of the trial; several instructions offered by him were refused or modified and he suggests if we will examine them we may find reasons why the court should have given them as offered; we have read the instructions offered, refused and given, and are of the opinion that the jury was fairly and fully instructed as to the law of the case. We assume if counsel had in mind any special objection to the action of the court in passing on the instructions he would point it out.

The main contention is that the evidence does not sustain the verdict, that it fails to show either negligence

1831.A.55

State of Illinois

vs

Chicago & Joliet Electric

Railway Company

Chicago, Ill.

Appellee Lulu King, was, with another woman, driving

south on a public highway on which the tracks of appellant

Chicago & Joliet Electric Railway Company, are located. As

she was approaching or upon a culvert and narrow part of the

said highway, one of appellant's cars running north, came over

a slight elevation about 700 feet south of the culvert. At

about the time the car and vehicle met, the horse driven by

appellee took fright and went off the road into a gully

below, sustaining the injuries resulting to her.

Under the circumstances, the injuries were extremely

serious and permanent, inflicting her. This action is

brought to recover for that injury and there was a verdict

and judgment of \$400.

Appellant's counsel does not argue that there was any

error of law in the conduct of the trial; several instances

were offered by him were refused or modified and he sug-

gests if we will examine them we may find reasons why the court

should have given them as offered; we have read the instanc-

es and offered, refused and given, and one of the opinions

that the jury was fairly and fully instructed as to the law

of the case. We assume if counsel had in mind any special

objection to the action of the court in passing on the in-

structions he would point it out.

THE COURT: I have no objection to the instructions.

THE COURT: I have no objection to the instructions.



of appellant or due care of appellee. There were several witnesses to the transaction. The testimony of appellee and her witnesses showed, or tended to show, that the car was approaching at a rapid rate of speed on a track that was not ballasted, and therefore noisy, that the horse became frightened as soon as the car came over the rise in the road 700 feet away, and showed great evidence of fright, but the motorman came on without slackening speed until he was opposite or nearly opposite, the horse when it plunged over an embankment about fifteen feet high. Evidence offered by appellant showed or tended to show that the car was running ten or twelve miles an hour, that the horse showed no symptoms of fright until about opposite the car, when it started up and went off the embankment, not opposite the car, and not where appellee's witnesses say it did, but several rods south of that point, where there was a descent of five or six feet into the gully. In short there was positive and ample evidence on the part of appellee to establish a case of negligence of appellant and there was positive and ample evidence on the part of appellant to establish a case of due care on its part. The jury not only saw the witnesses and heard them testify, but by consent of both parties viewed the premises; this view was for the purpose of enabling them to better understand the issues and the evidence, *Payson v Village of Milan*, 144 Ill. App. 304; and furnishes an added reason for not disturbing their verdict. Considering the condition of that part of the road where appellants car was to meet appellee, the jury was certainly justified in finding that it was not ordinary care for its motorman to approach a frightened horse without any effort to slacken speed or do anything to avoid accident. And on the question of due care of appellee, while there was some evidence that she was not trying to control the horse, the

of appellant on due care of appellee. There were several witnesses to the transaction. The testimony of appellee and her witnesses showed, or tended to show, that the car was approaching at a rapid rate of speed on a track that was not widened, and therefore noisy, that the horse became frightened as soon as the car came over the rise in the road 700 feet away, and showed great evidence of fright, but the motorman came on without slackening speed until he was opposite the horse when it plunged over an embankment about fifteen feet high. Evidence offered by appellee showed or tended to show that there was running on or twelve miles an hour, that the horse showed no symptoms of fright until about opposite the car, when it started up and went off the embankment, not opposite the car, and not where appellee witnesses say it did, but several rods south of that point, where there was a landing of live stock and some other things. In short there was positive and ample evidence on the part of appellee to establish a case of negligence of appellant and there was positive and ample evidence on the part of appellant to establish a case of due care on its part. The jury may only say that the evidence is conflicting, but the viewpoint of both parties viewed the premises; this view was for the purpose of enabling them to better understand the issues and the evidence. Payson v Village of Milan, 144 Ill. App. 504. The evidence on each side was not disturbing their verdict. Considering the condition of that part of the road where appellee's car was to meet appellee, the jury was certainly justified in finding that it was not ordinary care for the motorman to approach a frightened horse without any effort to slacken speed or do anything to avoid accident. And on the question of the care of appellee, while there was some evidence that the car was driving in a reckless manner, the

preponderance of the evidence is that she was using reasonable care. It is quite likely that the horse did not plunge over the abutment at the place testified to by appellee's witnesses, but that is not very material; candid, honest witnesses often vary materially in their testimony of occurrences like this. There is no question about the fright of the horse, and its action in consequence thereof resulting in the injury complained of; the amount of the verdict is small and we see no reason for disturbing it.

The judgment is affirmed.

...of the evidence is that she was using reason-  
...It is quite likely that the house did not change  
...at the place testified to by a witness's  
...but that is not very material; possibly, however  
...often very material in their testimony of occur-  
...There is no question about the right of the  
...and the action in consequence thereof resulting in the  
...of the verdict is small  
...on no reason for disturbing it.  
The judgment is affirmed.

STATE OF ILLINOIS, }  
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate  
Court, in and for said Second District of the State of Illinois, and keeper of the Records  
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the  
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the  
seal of the said Appellate Court, at Ottawa, this second day  
of August, in the year of our Lord one thousand nine hun-  
dred and thirteen.

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*Clerk of the Appellate Court.*





March Term, 1912, No.

141 - 18172

THE CITY OF CHICAGO,  
Defendant in Error,

vs.

CHARLES BRADLEY,  
Plaintiff in Error.

}  
} APPEAL TO MUNICIPAL COURT  
} OF CHICAGO.

183 I.A. 121

MR. PRESIDING JUSTICE BAKER

DELIVERED THE OPINION OF THE COURT.

This is a writ of error prosecuted to reverse a judgment against the plaintiff in error for violation of Section 2019 of the Municipal Code of Chicago, which provides that:

"Every common, ill-governed or disorderly house, room or other premises, kept for the encouragement of idleness, gaming, drinking, fornication or other misbehavior is hereby declared to be a public nuisance, and the keeper and all persons connected with maintenance thereof, and all persons patronizing or frequenting the same, shall be fined not exceeding two hundred dollars for each offense."

The complaint is in part as follows:

"Louis Delp, being first duly sworn, on oath deposes and says that Charles Bradley, late of the City of Chicago, on the 18th day of November, A. D. 1911, at the City of Chicago aforesaid, did then and there keep or maintain a common, ill-governed or disorderly house, room or other premises kept for the encouragement of idleness, gaming, drinking, fornication or other misbehavior, in violation of section 2019 of the Municipal Court of Chicago."

The record contains only the complaint and judgment and plaintiff in error contends that the judgment should be reversed for the following reasons: 1. The court erred in rendering a judgment in favor of the plaintiff and against the defendant. 2. The court erred in not dismissing the case as against the defendant. 3. The court had no jurisdiction.

The questions presented in this case were before the Supreme Court in Chicago v. Williams, 254 Ill., 360, and were all decided against the contentions of plaintiff in error in this case, and on the authority of that case the judgment is affirmed.

AFFIRMED.



# 1917-1918

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68 - 17587 October Term, 1911, No.

1911, 1911. No.

JOSEPH F. MARCINKEVICH,  
Defendant in Error,

vs.

JASON L. WILSON,  
Plaintiff in Error.

)  
)  
) ERROR TO THE MUNICIPAL COURT  
)  
) OF CHICAGO.  
)

183 I.A. 147

MR. JUSTICE BROWN DELIVERED THE OPINION OF THE COURT.

This is a writ of error to reverse a judgment of \$264.50 against the plaintiff in error entered by the Municipal Court in a suit in assumpsit for compensation for services rendered by the defendant in error to the plaintiff in error in the matter of certain land sales.

The suit was originally brought by Joseph F. Marcinkovich against George T. Wilson and Jason L. Wilson. A verdict for \$264.50 was rendered against both defendants by the jury to which the cause was submitted. After this verdict the suit was on motion of the plaintiff dismissed as to the defendant George T. Wilson and judgment was rendered on the verdict against the other defendant, Jason L. Wilson. It is assigned for error that the Court erred in allowing, after verdict, this dismissal as to one defendant and then entering judgment against the other. But the point is not argued in the brief of plaintiff in error.

Coggeshall vs. Beesley, 76 Ill., 445, holds that the course taken is an allowable one under Section 24 of the Practice Act as it then stood. The same provision is Section 39 of the present Practice Act.

Jason L. Wilson, the plaintiff in error, contends, however, that there was no evidence in the record sufficient to warrant the verdict against him; that the evidence did not tend to prove that he had ever employed Marcinkovich or ratified his

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employment by George T. Wilson, his son and agent; that as to two of the sales on which compensation was allowed by the jury, Marcinkevich was not entitled to any commission under the contract which was made by George T. Wilson with him; that the contract was for five per cent. only of the sums for which sales were made under certain conditions and on which certain amounts had been paid, while the jury, according to a claim made by Marcinkevich, allowed him the five per cent. in addition to \$12 a week which was actually paid to him, and which should have been credited on the commissions, and also allowed him commissions on sales where the payments had not met the conditions of the contract; and, finally, that Marcinkevich should not recover because he had no real estate broker's license from the City of Chicago.

We do not think the evidence shows, as a matter of law, that Marcinkevich was a real estate broker under the meaning of the Municipal Code. And all the other questions raised were for the jury, and we think their verdict was justified by that evidence taken as a whole which was allowed by the Court to stand as against Jason L. Wilson. Nor do we find anything requiring reversal in the instructions or rulings of the Court below.

The judgment of the Municipal Court of Chicago is therefore affirmed.

AFFIRMED.

2000



THE CITY OF CHICAGO,  
Defendant in Error,

vs.

THOMAS COMPARE,  
Plaintiff in Error.

)  
) ERROR TO THE MUNICIPAL COURT  
)  
) OF CHICAGO.

183 I.A. 148

MR. JUSTICE BROWN DELIVERED THE OPINION OF THE COURT.

The plaintiff in error was accused by a complaint properly sworn to and filed in the Municipal Court of "making, aiding, countenancing and assisting in making" an improper noise, riot, disturbance, breach of the peace and diversion tending to a breach of the peace in violation of Section 2012 the Chicago Code of 1911." He waived a trial by jury and the Court found him on trial "guilty of a violation of the ordinance described in the complaint herein, known as Section 2012 of the Chicago Code of 1911", assessed a fine against him of \$100, gave judgment against him in favor of the City for the fine and costs and ordered his confinement in the House of Correction until the fine and costs were paid or worked out or the defendant otherwise discharged. A motion to vacate the judgment was afterwards denied.

By the Statement of Facts it appears that the evidence only tended to show him guilty of another offence than the one charged. It is thus expressed:

"The testimony of the officer was that the defendant on said 5th day of October, 1911, had crawled under a canopy of the elevated station and was looking through the cracks on the elevated station under women's clothes as they were passing up and down the station."

If the defendant was guilty of this indecent, depraved conduct there was an ordinance under which he could be prosecuted. But it was not Section 2012 of the ordinances of 1911. The

841 A.1281

The City argues that this conduct is a "diversion tending to a breach of the peace." It is not a "diversion", but a dirty, indecent act. It tends to a breach of the peace only as any such disgusting conduct tempts one discovering it to assault the perpetrator. But this is not the meaning of the ordinance, which cannot be stretched to cover the offence which the evidence tended to prove, but which the defendant denied.

The judgment conviction and fine is reversed and the cause remanded to the Municipal Court.

REVERSED AND REMANDED.



March Term, 1912, No.  
121 - 18152

JOHANNA THELSEN,  
Defendant in Error,

vs.

AXEL HOGARD and HARRY E. LAWVER,  
doing business, etc.,  
Plaintiffs in Error.

)  
)  
) ERROR TO THE MUNICIPAL  
)  
) COURT OF CHICAGO.  
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183 I.A. 158

MR. JUSTICE BROWN DELIVERED THE OPINION OF THE COURT.

This is a writ of error the purpose of which is to reverse a judgment of \$275 against the defendants Hogard and Lawver, rendered on the verdict of a jury in the Municipal Court. The action is based on a statement of claim, which as amended reads:

"Plaintiff's claim is for damages for injuries by reason of which plaintiff became sick, sore, lame and disordered and has so continued for a long space of time, to-wit, from thence hitherto and suffered a splintered and broken jaw by reason of the defendants' negligence in performing certain dental work on her teeth May 21, 1900."

We have not had the assistance of any brief or argument from the defendant in error. Because of too great or too little confidence in her case, she did not follow it to this Court by appearance to the writ of error.

A thorough examination of the record has however been made by us to see if the verdict of the jury and the judgment could be properly sustained against the attacks made on them by the defendants. We have reached the conclusion that they can not.

That testimony concerning an amount paid by plaintiff for medical services was admitted when no mention was made of any such expenditure or damages in the statement of claim, may be passed over. It is not necessary that we should decide whether the rule is different in the Municipal Court ~~and~~ in connection

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with statements of claim from that governing common law declarations and proof thereunder of special damages.

Chicago v. O'Brennan, 65 Ill., 160;

Adams v. Gardner, 78 Ill., 568;

C. B. & Q. R. R. Co. v. Hale, 83 Ill., 360;

North Chicago Street Ry. Co. v. Cotton, 41 Ill. App., 311.

But in our opinion the instruction (No. 16) which was given to the jury would necessitate a reversal of this judgment in any event, even if a new trial were necessary.

The instruction informed the jury that they might consider the loss of time and the damage from permanent as well as temporary injuries, if they were proven. Undoubtedly this is true as an abstract proposition if the statement of claim was sufficient to cover the items, (a question which we do not pass on) but the instruction was erroneous in this case, nevertheless, for there is no evidence in the record of the value of any time that was "lost" by the plaintiff, whatever view may be taken of the testimony that she was "laid up" as the result of the action of the defendants; nor is there any evidence of "permanent injuries" in the record.

"An instruction must be on a theory advanced by the pleadings and which there is some evidence to support."

Himrod Coal Co. v. Clingen, 114 Ill. App. 568-575;

Rosenkrans v. Barker, 115 Ill. 332.

But our consideration of the evidence in this case compels us to go farther. The statement of claim is based on malpractice in dental surgery, "negligence in performing certain dental work on (plaintiff's) teeth," by reason whereof the plaintiff "suffered a splintered and broken jaw."

Not only is there no evidence of "a splintered and



broken jaw", but in our opinion there is no competent evidence of malpractice or negligence. There was evidence by the plaintiff and a friend that plaster of paris was left in the plaintiff's mouth to secure an impression for a false teeth plate, allowed to harden and then broken out with a hammer and a knife, coming out in several pieces. But there was no evidence in the plaintiff's case that this was malpractice or anything but the usual method of proceeding, and expert evidence was put in by the defendants which showed it to be the one generally used. The plaster for an impression must set and cannot be taken out except in pieces afterward. This is of common knowledge and is confirmed by the evidence in this case. That the dentist looked out of the window while the plaster was setting, that he allowed fifteen or twenty minutes for the setting, that he said "I forgot about that", or that the jaw was swollen and sore afterward, separately and all together fall short of showing malpractice. Something else is necessary to that conclusion - proof that the delay, if there was delay, would make the difference between a proper and improper operation - and had something to do with the condition of the jaw afterward. See opinion in *Beline vs. Christie, et al.*, No. 18519, in this Court, not yet reported, and cases therein cited.

The plaintiff's testimony moreover was contradictory and in some respects, to our minds, improbable. She testifies that after all the suffering which she lays to the negligence and malpractice of the defendants, immediately recognized, she went to them for further dental surgery, - to have a tooth extracted.

We think the Court should have peremptorily instructed the jury at the end of the plaintiff's case, and that, failing to do so, that he should have done so after all the evidence had been heard.

THE JUDGMENT IS REVERSED.

REVERSED.



121 - 18152. THEISEN v. NOCARD et al.

FINDING OF FACTS.

There was no negligence of the defendants in performing dental work for the plaintiff proven.





March Term, 1912, No.

62 -18084

EDGAR J. COOK,  
Defendant in Error,

vs.

E. F. GRAHAM,  
Plaintiff in Error.

)  
) ERROR TO MUNICIPAL COURT  
)  
) OF CHICAGO.  
)

183 I.A. 167

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

The defendant in error, hereinafter called plaintiff, brought suit against the plaintiff in error, hereinafter called defendant, to recover \$925.25 for services and expenses incurred in connection therewith. The cause was submitted to the Court and on a hearing the Court found the issues for the plaintiff and assessed his damages at \$275 and entered judgment therefor.

The employment of the plaintiff by the defendant is not disputed. The controlling questions in issue were the scope of the employment and authority of the plaintiff thereunder to make certain expenditures and the value of the services rendered. The evidence is conflicting and an analysis or detailing of the same here would avail nothing. We have made a careful study of the record and are not disposed to hold that the finding of the Court was clearly and manifestly against the weight of the evidence. The legal propositions presented by the defendant may be conceded, but the decision in the case rests upon the view taken of the evidence bearing upon the questions of fact mentioned. With the conclusion of the trial Court thereon, we think this Court should not interfere, and accordingly affirm the judgment.

AFFIRMED.

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March Term, 1812, No.  
15123

I. C. CARDEN,  
Defendant in Error,

vs.

CHICAGO RAILWAYS COMPANY,  
Plaintiff in Error.

ERROR TO MUNICIPAL COURT  
OF CHICAGO.

183 I.A. 168

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

The defendant in error, hereinafter called plaintiff, on a trial before a jury in the Municipal Court of Chicago recovered a judgment against the plaintiff in error, hereinafter called defendant, for one thousand dollars. The action was for damages for personal injuries received in alighting from a street car of the defendant and claimed to be the result of the defendant's negligence.

The defendant insists that the evidence showed the plaintiff guilty of contributory negligence and also failed to prove the negligence charged. The first of the said questions is subject to some doubt in our minds. But primarily they are questions of fact for the jury and under the law the verdict of the jury thereon should not be disturbed unless clearly and manifestly against the weight of the evidence; and we do not feel warranted in substituting the Court's doubts for the conviction of the jury on the said question, as expressed in its verdict.

On the recross examination of plaintiff he was asked the following question: "Will you be examined by a doctor appointed by me, or one appointed by the court, either in the judge's chambers or place convenient to you, such examination to take place in the presence of your own physician, as to the injuries resulting from this accident?" To this question the

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The following is a list of the names of the persons who have been elected to the office of Justice of the Peace for the year 1881-1882. The names are given in alphabetical order of their surnames. The names of the persons who have been elected to the office of Justice of the Peace for the year 1881-1882 are: [illegible text]

court sustained the plaintiff's objection and the witness was not allowed to answer. The defendant insists that this ruling of the Court was prejudicial and reversible error. The plaintiff cites *Cole v. East St. Louis*, 158 Ill. App. 494, where the Court holds that a similar ruling of the court was not error and shows that the Supreme Court denied a petition for a writ of certiorari, making the opinion final. The defendant then shows by presenting, by leave of the Court, a certified copy of the petition for writ of certiorari, that the point in question was not raised therein.

While the Court could not have compelled the plaintiff to submit to an examination as proposed, nevertheless the question was a proper one, and if asked during the cross-examination it would have been error not to allow it.

*Sertout v. Crane Co.*, 142 Ill. App., 49;

*Schlichte v. Chgo. Electric Transit Co.*, 157

Ill. App., 151;

*Jungel v. Aurora E. & C. Ry. Co.*, 177 Ill. App. 435.

On the redirect examination immediately following the cross-examination the plaintiff was asked only about the step on the car. The plaintiff's contention that the re-cross examination be limited to the matters brought out on the redirect examination is, under the technical rule, correct; or at any rate was within the discretion of the trial Court and under the circumstances we are not prepared to hold the court's ruling such an abuse of its discretion as to cause a reversal of the case. It may be further mentioned that the defendant introduced no evidence in relation to the plaintiff's injuries, and the said enquiry going only to his said injuries, here solely on the question of damages; and in view of the testimony by the plain-





tiff, and by others in his behalf, as to his injuries, loss of time, etc., the verdict of one thousand dollars would not, as it seems to us, have been diminished by reason of the ruling of the Court permitting the question.

It is insisted by the defendant that the plaintiff's statement of claim did not state a cause of action. If tested by demurrer under the strict rules of common law pleading, it may be that the demurrer would have been sustained. However that may be, we think, under the Municipal Court Act and the rules of the Court, it is very clear that the statement of claim was sufficient.

The judgment is affirmed.

AFFIRMED.



March Term, 1912, No.  
136 - 18167

MARGARET A. POTTINGER,  
Defendant in Error,  
vs.  
GOTTLIEB ERHARDT,  
Plaintiff in Error.

ERROR TO MUNICIPAL COURT  
OF CHICAGO.

183 I.A. 169

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

The Municipal Court of Chicago entered judgment by confession in favor of the defendant in error against the plaintiff in error for \$120 for rent for the months of September and October, 1911, on a lease dated July 29, 1910, of certain described premises for a term beginning August 1, 1910, and ending April 30, 1913.

The plaintiff in error petitioned the Court to vacate and set aside said judgment and allow him to appear and defend in said action. The petition was sworn to and set up as a defense that the petitioner assigned said lease to one U. G. Eller on May 9, 1911, at which time the said Eller took possession thereof and occupied the same until on or about October 5, 1911, when said Eller was adjudged a bankrupt and the said premises taken possession of by a receiver appointed in said bankruptcy proceedings in the United States District Court, and that the said purported written lease was not executed by Margaret A. Pottinger, but instead thereof, and in fact was executed by a Mr. Pottinger, whose first name is not now known by this petitioner, without any authority in writing to execute the same in behalf of said Margaret A. Pottinger, the lessor, and consequently said purported written lease or contract was within the statute of frauds and therefore not binding, etc., on the petitioner, also that he vacated the said premises on or about

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May 9, 1911, and has not occupied the same since that time.

The Statute of Frauds invoked reads:

"No action shall be brought to charge any person upon any contract for the sale of lands, tenements or hereditaments or any interest in or concerning them, for a longer term than one year, unless such contract or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized in writing, signed by such party."

The party sought to be here charged, the plaintiff in error, signed the said lease of the said premises, and so does not come within the said statute. *Farwell v. Lowther*, 18 Ill. 252.

Further, the plaintiff in error took possession of the premises under the lease and in our opinion the defense sought to be interposed could be of no avail and the Court properly denied the petition. *Fields v. Brown*, 90 Ill. App. 195.

The judgment is affirmed.

AFFIRMED.

1911, and was not included in the same group as 1910.

### The Division of the United States

The United States is divided into four main regions: the Northeast, the South, the West, and the Midwest. Each region has its own characteristics and history. The Northeast is the most densely populated and has a long history of industry and commerce. The South is known for its agriculture and its role in the Civil War. The West is a vast area with a rich history of exploration and settlement. The Midwest is a central region with a strong agricultural base.

The four regions are: the Northeast, the South, the West, and the Midwest.

Each region has its own characteristics and history.

The Northeast is the most densely populated and has a long history of industry and commerce.

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The South is known for its agriculture and its role in the Civil War.

The West is a vast area with a rich history of exploration and settlement.

The Midwest is a central region with a strong agricultural base.

The four regions are: the Northeast, the South, the West, and the Midwest.

Each region has its own characteristics and history.

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October Term, 1912. No. 7

48 - 18485

HALL CASKET COMPANY,  
Defendant in Error,

vs.

FRED F. ROBERTS and MARY A. ROBERTS,  
Plaintiffs in Error.

} ERROR TO MUNICIPAL  
} COURT OF CHICAGO.

183 I.A. 177

MR. PRESIDING JUSTICE F. A. SMITH  
DELIVERED THE OPINION OF THE COURT.

The order or judgment brought before us for review by this writ of error was entered in a supplementary or citation proceeding in the Municipal Court of Chicago under Section 64 of the Municipal Court Act, as amended in 1907.

We have reviewed the evidence in the record and considered the arguments of counsel, and are of the opinion that the evidence clearly preponderated in favor of the ownership of the property sought to be reached by the citation in Mary A. Roberts, plaintiff in error. The judgment on which the citation proceedings were based was in favor of the defendant in error and against Fred F. Roberts, plaintiff in error. Upon the evidence before the trial court, the supplementary or citation proceedings should have been dismissed. The judgment of the trial court is, therefore, reversed with a finding of fact and judgment in favor of Fred F. Roberts and Mary A. Roberts, plaintiffs in error, and against Hall Casket Company, defendant in error, dismissing the citation proceedings, will be entered here.

REVERSED AND JUDGMENT HERE.

1911. A. 117

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123-16571

STATES PRINTING COMPANY,  
suing as

CARRIER PRINTING COMPANY,  
Defendant in Error,

vs.

LEVEN ADVERTISING COMPANY,  
sued as

LEVEN-NICHOLS ADVERTISING  
COMPANY, a corporation,  
Plaintiff in Error.

MEMORANDUM TO MUNICIPAL  
COURT OF CHICAGO.

183 I.A. 178

MR. PRESIDING JUSTICE F. A. SMITH  
DELIVERED THE OPINION OF THE COURT.

The Carrier Printing Company, a corporation, whose name was later changed to the States Printing Company, defendant in error, instituted suit in the Municipal Court of Chicago against the Leven-Nichols Advertising Company, a corporation, whose name was later changed to the Leven Advertising Company, plaintiff in error, on a claim for printing. The Leven Advertising Company was engaged in the business of buying and selling advertising space for its customers, preparing copy and negotiating with printers and publishers with reference thereto, and in advising its customers as to the selection of publications in which to advertise.

The particular items sued on in dispute in the trial court were for booklets and envelopes printed by the defendant in error on the order of plaintiff in error in the month of January, 1910.

The case was tried by the court without a jury, and the court found for the plaintiff for the full amount claimed and entered judgment on the finding. No question of law is preserved in the record by the submission of propositions of law. The evidence shows no contract in the name of the Alabama & Mississippi

871 A.1881

Railroad Company for whom the booklets and envelopes were printed. The plaintiff in error, as shown by the evidence, ordered and supervised the printing work done by the defendant in error. On the books of the defendant in error there appears to be a charge against the Alabama & Mississippi Railroad Company for the printing in question, but the evidence shows that this charge was made at the request of plaintiff in error. It was repudiated by the railroad Company, and the plaintiff in error shows no authority for ordering the printing charged to the Railroad Company.

A review of the evidence convinces us that the finding of the court is sustained by the evidence. The judgment is affirmed.

AFFIRMED.





Celebrity Cases, 1912. No.

100-10052

JAMES W. STORMS,  
Defendant in Error,

vs.

EDWARD R. MURPHY,  
Plaintiff in Error.

ERROR TO MUNICIPAL  
COURT OF CHICAGO.

183 I.A. 179

MR. PRESIDING JUSTICE F.A. SMITH  
DELIVERED THE OPINION OF THE COURT.

Defendant in error, Storms, sued plaintiff in error, Murphy, in the Municipal Court of Chicago for \$200 damages for loss of personal property belonging to Storms while a guest at the hotel of plaintiff in error, known as the Park Hotel, located in Chicago, Illinois, the statement alleging that the personal property was in the care and custody of the plaintiff in error as such hotel-keeper, and that the property was lost while in such custody through the negligence of the plaintiff in error on or about November 23, 1911. The case was tried in the Municipal Court before the judge without a jury, and there was a finding and judgment in favor of defendant in error and against plaintiff in error.

The record shows a certificate by the trial judge to the effect that the evidence shown therein is a correct statement of the facts appearing on the trial of the cause and of all questions of law involved in the cause and the decisions of the court upon all such questions. An inspection of the contents of the certificate shows that it contains the evidence offered by the parties to the suit. As we have frequently held, this is not a statement of facts; it is a statement of the testimony of the witnesses. No questions of law were submitted to the court to be held as the law governing



the case. The certificate does not comply with the Municipal Court Act. The questions sought to be raised by the brief are not, therefore, properly before us and we cannot review them. The judgment is affirmed.

AFFIRMED.



ROC - 18887

RICHARD J. ROSS,  
Plaintiff in Error,

vs.

R. J. ROSS MANUFACTURING CO.,  
FRANK DRAB, HAROLD COLEMAN and  
R. W. PREBLE,  
Defendants in Error.

ERROR TO SUPERIOR

COURT, COOK COUNTY.

183 I.A. 180

MR. PRESIDING JUSTICE F. A. SMITH  
DELIVERED THE OPINION OF THE COURT.

Plaintiff in error, Richard J. Ross, seeks to review in this proceeding the decree of the trial court in the case of Ross v. Ross Manufacturing Company et al. in so far as that decree relates to an increase of the salaries of the defendants in error, Drab and Coleman.

The bill filed by Ross sets forth that he is the owner of thirty shares of stock of the par value of \$100 each, in the R. J. Ross Manufacturing Company, an Illinois corporation, organized in January, 1909, with a fully paid capital stock of \$5000, which was increased in December, 1909, to \$10,000. Thirty shares of the fifty share increase were issued to the stockholders, the other twenty shares not being issued or offered for subscription. Plaintiff in error, Ross, and defendants in error, Drab and Coleman, constituted the board of directors. On December 31, 1910, Drab and Coleman, over the protest of Ross and against his vote, caused to be passed a resolution for a sale of the remaining twenty shares of stock to defendant in error Preble. The bill sought to cancel this issue of twenty shares to Preble. The bill also alleged that on January 10, 1911, the defendants in error, Drab and Coleman, caused to be passed against the vote and protest of Ross a resolution

1891. VII. 180

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increasing the salary of Drab from \$1500 to \$3000 per annum, and that of Coleman in like amount, Coleman and Drab being officers of the company, and alleges that the resolution was illegal, fraudulent and void, and that Coleman and Drab had drawn the increased salaries.

The prayer of the bill is for the cancellation of the twenty shares of stock issued to Preble; that the resolution of the board of directors increasing the salaries of Drab and Coleman be declared void, and an accounting had of the amounts drawn by Drab and Coleman on account of such increased salaries and for general relief.

The defendants answered the bill, and on hearing the court entered a decree, granting the relief prayed for by the bill as to the twenty shares of stock, and ordered the cancellation of the same, and enjoined its re-issuance. The court also found and decreed that while the preponderance of the evidence adduced at the hearing showed that the increases of salaries provided for by the resolution in question are more than are usually paid by other concerns engaged in the same line of business for similar services, the preponderance of the evidence did not show that the amounts so provided for are unreasonable for such services so rendered by Drab and Coleman, and that the resolution was not void.

The errors assigned relate wholly to the salary question, and challenge that part of the decree finding that the resolution in question was not void, and in finding that the complainant had not established the fact that the salaries so voted were unreasonable.

As stated in the bill and found in the decree, the resolution increasing the salaries of Drab and Coleman was passed by the votes of Drab and Coleman who constituted a majority of the board of directors. This fact as to the votes by which the resolution was carried affirmatively establishes the illegality of the resolution and of the increases in salaries. The facts found in the decree and alleged in the bill show that the resolution was illegal



and void. (Verhees v. Mason, 345 Ill. 256; Adams v. Burke, 201 id. 215.) The salaries were drawn from the corporation under the resolution. The complainant was not obliged, under the law, to establish the fact of the unreasonableness of the salaries, having shown to the court that the resolution, under which the salaries were paid to Drab and Coleman, was illegal and void. The fact of illegality having been established was a sufficient basis for a decree in favor of the complainant, plaintiff in error.

That part of the decree above mentioned, referring to the resolution and the increase of salaries, is reversed; the remaining portions of the decree are affirmed. The cause is remanded to the trial court for the taking of an account between the R. J. Ross Manufacturing Company and Drab and Coleman, and such further proceedings in accordance with this opinion as may be deemed proper.

AFFIRMED IN PART, REVERSED IN  
PART AND REMANDED WITH  
DIRECTIONS.



248 - 18710

THE PEOPLE OF THE STATE OF ILLINOIS  
for use of the County of Cook and  
A. C. Wagner, ex rel A. C. Wagner  
as informer,

Plaintiff in Error,

vs.

MUTUAL LIFE INSURANCE COMPANY of  
New York,

Defendant in Error.

ERROR TO MUNICIPAL  
COURT OF CHICAGO.

183 I.A. 186

MR. PRESIDING JUSTICE F. A. SMITH  
DELIVERED THE OPINION OF THE COURT.

An action was brought in the Municipal Court of Chicago to recover the penalty imposed by statute prohibiting the giving of rebates by insurance companies.

In the action the Mutual Life Insurance Company is charged with having given a rebate to Charles W. Jaissle to induce him to insure his life with that company. It issued and delivered to Jaissle its policy in which it acknowledged the receipt from him of \$23.14 in payment of the premium thereon for the first year. It is contended that the statute was violated by the defendant company, defendant in error here, in two particulars,- that it gave a rebate of twenty-five per cent., amounting to \$5.78, to the insured as an inducement to insure, thereby discriminating between insurance of the same class and equal expectation of life, and that it gave a valuable consideration not expressed in the policy.

The trial was before the court and a jury. The jury returned a verdict of not guilty.

Two main points are presented in argument by plaintiff in error in support of his contention that the judgment should be reversed: (1) He asks this court to say that the verdict was





manifestly against the weight of the evidence; (2) the jury were prejudiced by the remarks of counsel.

Upon the examination of the evidence, we are unable to reach the conclusion that it does not preponderate for the defendant. We cannot reverse the judgment on the ground that it is manifestly against the weight of the evidence.

As to the second ground urged, the abstract shows that numerous objections were made to the remarks of counsel for defendant in error in his argument to the jury. The court sustained the objections and struck out the remarks. We think the court maintained a sufficient control over the trial and argument of the case, and the remarks so stricken out by the court do not appear in any manner to have influenced the verdict of the jury. The case should not be reversed on that ground.

The judgment is affirmed.

AFFIRMED.

medically against the rights of the citizens; (2) the law

was proposed by the Senate - 7-10-1911.

When the amendment of the law was made, it was decided

to have the amendment made in the House of Representatives - 7-10-1911

Bill was passed by the House of Representatives - 7-10-1911

It was then sent to the Senate - 7-10-1911

In the Senate, the amendment was made, the House of Representatives

and the Senate passed the amendment - 7-10-1911

The President signed the law - 7-10-1911

The law was then published in the Statutes at Large - 7-10-1911

The law was then enforced - 7-10-1911

The law was then enforced - 7-10-1911

The law was then enforced - 7-10-1911

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The law was then enforced - 7-10-1911

284 - 18748

EDISON KEITH & CO., a corporation,

Defendant in Error,

vs.

THOMAS F. KEEVAN and MRS. THOMAS  
F. KEEVAN,

Plaintiffs in Error.

ERROR TO MUNICIPAL

COURT OF CHICAGO.

183 I.A. 187

MR. PRESIDING JUSTICE F. A. SMITH  
DELIVERED THE OPINION OF THE COURT.

An action was brought by Edison Keith & Company, the defendant in error, hereinafter called the plaintiff, against the plaintiffs in error, hereinafter called defendants, for the recovery of \$184.77. The amended statement of claim filed by the plaintiff sets out two distinct grounds as a basis of the action. The first is for a balance due upon an account stated, and the second is for goods, wares and merchandise sold and delivered, showing the items and the dates and also the credits. The defendants were personally served and filed their appearance, demanding a trial by jury. They thereupon filed an affidavit of merits which was stricken as insufficient, and thereafter they filed another affidavit of merits to the amended statement of claim, which affidavit was also stricken as insufficient, and thereafter they filed a third affidavit of merits, which was held to be insufficient and stricken, and the court entered a judgment by default in accordance with the rules of the Municipal Court for the amount of the affidavit of claim.

This writ of error brings before the court two questions which have been argued by counsel for plaintiffs in error.

(1) Did the affidavit of merits in question constitute a sufficient defense to plaintiff's claim; and (2) did the Municipal

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STATE OF NEW YORK  
IN SENATE  
JANUARY 11, 1906.

Court err in entering judgment upon the affidavit of plaintiff's claim, if the affidavit of merits was properly stricken as insufficient, without requiring the damages to be assessed by jury?

The amended affidavit of merits set up that the plaintiff's suit was not upon an account stated for balance due the plaintiff; that there was nothing due the plaintiff from the defendant, Mrs. Thomas F. Keavan, by reason of plaintiff's agreement with said defendant on or about August 22, 1911, that in consideration of the guaranty to the plaintiff, the plaintiff extended the time for the payment of the goods by the defendant, and agreed to permit her to pay for same from the profits as they were derived from her millinery business; and that the defendant was paying the plaintiff the profits as they were derived and had paid the sum of \$447 to plaintiff, and there was nothing due plaintiff from the defendant, and that there was nothing due from the defendant, Thomas F. Keavan, by reason of plaintiff's extension of time for payment to defendant, Mrs. Thomas F. Keavan, under the contract of guaranty set up in the plaintiff's statement of claim.

In our opinion the amended affidavit of merits does not set up a valid defense. It does not in terms deny that there was an account stated. It does not show facts as to the extension of time for the payment of the goods furnished by plaintiff to defendant. It does not state for how long the extension was made, but sets up an indefinite arrangement to pay out of profits. The substance of the defense relied on in the affidavit of merits is that while the goods were properly sold and delivered and that payment was guaranteed by a written contract, copy of which was attached to and filed with the plaintiff's statement of claim, the money was not due because it was only to be paid out of the profits of the business. The receipt by the defendant of the goods, quality of the goods, the correctness of the account except \$25 which was paid after the suit was commenced, were not in dispute.



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The contract relied upon in the affidavit was void for want of consideration, for lack of mutuality and for indefiniteness. The affidavit does not even state that there were not sufficient profits accrued at the time suit was commenced to pay the entire bill. The court did not err in striking the affidavit.

The judgment by default was properly entered under Rule 17 of the Municipal Court. It was not reversible error to assess the damages without a jury even though an appearance had been filed and a jury demanded. *Dubois v. Greenbaum*, 13 Ill. App. 453; *Second National Bank v. Clancy*, 178 id. 467. In the latter case the judgment was affirmed in the Supreme Court by a denial of the application for a writ of certiorari. If a jury in the case under review had been called, the court would have been compelled to instruct them to find a verdict for the plaintiff. Under Section 19 of the Municipal Court Act, that court is sole judge of its rules of practice, and its decisions in respect thereto shall not be subject to review unless in the opinion of the reviewing courts relief is necessary to prevent a failure of justice. In our opinion, substantial justice has been done between the parties, excepting that the judgment is for too large an amount by \$25. The judgment is affirmed provided the defendant in error shall, within five days, remit in writing the sum of \$25 paid by plaintiffs in error subsequently to the filing of the suit. If the remittitur is not made, the judgment will be reversed and the cause remanded for a new trial. The costs in this court will be divided between the parties.

AFFIRMED ON REMITTITUR.



October Term, 1912. No.

93 - 18538

BENJAMIN G. ELSER,  
Defendant in Error,

vs.

HENRY L. HUGHES,  
Plaintiff in Error.

ERROR TO MUNICIPAL

COURT OF CHICAGO.

183 I.A. 188

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This was a suit brought to recover commissions for the sale of real estate. The controlling facts are not disputed.

Hughes, the defendant, put his property into the hands of Elser, the plaintiff, to sell for \$7500 cash, \$500 to be paid as earnest money on entering into a contract of sale. On or about November 11, 1911, Elser submitted the terms to one Ross. The latter made a counter proposition to purchase for \$7394, \$100 to be paid as earnest money and the balance in two payments, and signed a contract to that effect, and handed \$100 to Elser. Hughes declined to accept it and, feeling indignant at the proposition, told Elser that he would not sell to Ross at any price, and thereupon Elser saw Ross and returned to him the \$100. The next day, November 22, Ross saw Hughes personally, who was about to leave for New York, and, as a result of their meeting, Hughes gave written authority to his attorney to close the deal with Ross, practically on the original terms submitted by Elser, provided another party did not take the property before noon the following day. After that hour, the latter party not appearing, said attorney, in the name of Hughes, entered into a contract with Ross for the sale of the property upon said terms, and later it was decided to him. On Hughes return he visited Elser at his office and told him the

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property was sold, but did not tell him to whom. His own testimony on the subject was as follows:

"I said, 'Mr. Elser, the property has been sold, sold in my absence in New York. I consider you are entitled to some compensation, and I want to give you something'; and I said, 'You didn't make the sale,' and he says, 'If Mr. Ross bought it, I am entitled to full commission.' I said, 'You didn't make the sale; it don't make any difference who bought it; I want to give you something for your services.' It was Christmas time and I thought he felt disappointed and wanted a little money, and I gave him a check and endorsed on the face 'In full of all demands,' and I handed him the check and he took it. Mr. Elser at that time claimed that if I sold to Mr. Ross, he was entitled to the whole commission."

Said check was for \$50.

The case was tried before the court without a jury. No propositions to be held as law were submitted. Only two questions are argued in plaintiff in error's brief; namely, (1) whether defendant in error was the efficient or procuring cause of the sale, and (2) if so, whether the acceptance of the check, stating on its face "In full of all demands", was an accord and satisfaction.

In the absence of the submission of any propositions to be held as law, these questions are presented upon the record only as questions of fact. We think the court was justified from the evidence in finding that plaintiff was the procuring and efficient cause of the sale, and that the payment of <sup>the</sup> \$50 did not, under such circumstances, constitute accord and satisfaction. The court was justified in believing that the resumption of negotiations with Ross by Hughes personally, after he had directed Elser to abandon them, and his subsequent concealment from Elser that he had sold the property to Ross indicated bad faith and an intention to deprive Elser of his commission. While Elser had not brought Ross to the point of accepting Hughes' terms, further efforts in that direction were prevented by Hughes, and the fact that Ross, being advised of it, immediately went to Hughes and offered to purchase on the original terms submitted to him by Elser, would indicate that the offer would have come through Elser but for Hughes' intervention in the midst of negotiations.







Nor, under the circumstances, do we think the court erred in its conclusions that there was no accord and satisfaction. The check was given under a concealment of the fact that he had sold to Ross which Hughes well knew if disclosed would lead Elser to demand his commission.

Nor was the check given upon a disputed claim. The words "In full of all demands" were not conclusive. The circumstances under which it was given, as disclosed by Hughes' own testimony, indicate that there was no dispute, but simply a disposition on his part to remunerate Elser for what he would have him believe were earnest but fruitless efforts to sell to Ross.

It is assigned as error that the court did not hold that the plaintiff did not procure the purchase, that it did not hold that the acceptance of said check was an accord and satisfaction, and that it did not hold that there was a dispute between plaintiff and defendant and that the check was accepted in settlement thereof. As above stated, there is no basis for the assignment of such errors as questions of law. The court's finding thereon as questions of fact will not be disturbed. The other errors assigned relate to the admission and rejection of evidence, but in what specific instances was not pointed out or argued.

The judgment is affirmed.

AFFIRMED.



124 - 18576

FRANK ORMINSKI,  
Defendant in Error,

vs.

TAKLA KANIA,  
Plaintiff in Error.

ERROR TO MUNICIPAL

COURT OF CHICAGO.

183 I.A. 189

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This was an action to recover possession of a store brought by the lessor of the premises against the widow of the lessee. The lease was in writing and for the term of four years. During the term the lessee died and thereafter his widow, with their minor child, remained in possession of the premises and paid the rent provided for in the lease until the end of the term, April 30, 1917. On May 1, 1912, said action was commenced and judgment for possession was rendered against plaintiff in error.

It is contended by plaintiff in error that upon the record no action could lie against her except as a tenant from month to month, and that plaintiff in error was not served with proper notice of a demand for possession of the premises.

It is apparent that the action was brought under Paragraph 4, Section 3, Chap. 57 of our revised statutes, giving each right of action "when any lessee of the lands or tenants, <sup>or any</sup> person holding under him, holds possession without right, after the termination of the lease or tenancy by its own limitation," and that plaintiff in error held possession under the lessee.

A lease for a term of years is a chattel real, and the term "real estate," as used in the Conveyancing Act, embraces chattels real. (Sec. 32, Chap. 30, R. S.) <sup>30</sup> <sup>87A 2271</sup> In her capacity as heir the widow inherited an interest in said lease, the obligations and covenants of which inured to and were made binding upon the heirs of the parties thereto. As an heir she held possession and paid rent under the

[illegible]

lease. One of the covenants thereof required the surrender of such possession at its termination. Holding as she did under the lease and failing to comply with such covenant, the action was properly brought against her. Of course, in such a case no notice to quit or demand of possession was necessary. (Sec. 12, Chap. 80, P. S.)

These propositions will hardly be questioned. But plaintiff in error contends that she was not sued as an heir because the minor child was not also made a party defendant. The fact that she was made sole defendant did not determine the capacity in which she was sued. The covenant to surrender the premises was binding upon the heirs severally, and it was, therefore, unnecessary that the minor or other heirs, if any, should have been joined as defendants. The judgment is affirmed.

AFFIRMED.





162-16618

HENRY G. ANDERSON,  
Defendant in Error, }

vs. }

CHARLES E. NIESSE,  
Plaintiff in Error. }

ERROR TO MUNICIPAL

COURT OF CHICAGO.

183 I.A. 191

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This was an action brought to recover commissions for the sale of a farm claimed to be due from plaintiff in error to defendant in error.

The main and conclusive question is whether the evidence supports the theory of an agreement, express or implied, to pay such commissions. We shall not undertake to revise the testimony in detail, but shall state our conclusions as to its manifest import.

At the time of the transaction in question, Niesse and his partner, Willing, were doing business as Charles E. Niesse & Co., selling Idaho lands as agents of the Weiser Valley Land & Water Co. Anderson was employed by Niesse & Co. to make sales of such lands upon a commission of ten per cent. One Stephen Nock, the owner of the farm in question, had become interested in the Idaho lands sufficiently to accompany Anderson out there to look at them. He was considering the purchase of a tract for \$4500, but had not enough cash to pay for it. The deal being likely to fall through, Anderson thought the sale might be effected if Nock's farm was taken in exchange at \$7500; but as Niesse & Co. had to account to the Weiser Valley Land & Water Co. in cash or purchase money mortgages, it was necessary, in order to effect the sale of the Idaho land to Nock, that his farm be converted into cash. After



negotiations between all parties interested, the farm was sold to one Donlea for \$7000, which was applied on the sale to Nock of the Idaho land at \$7500, the \$500 difference having been deducted by agreement from Anderson's commission of \$950 on the Idaho sale. When the transaction was completed by a deed of the farm directly from Nock to Donlea and payment of the cash over to Miesse & Co. to apply on the sale of the Idaho land to Nock, Anderson was credited on the books of Miesse & Co. with \$950 and charged with \$500.

Donlea was unwilling to pay more than \$7000 for the farm, and Nock would not purchase the Idaho land unless he was allowed \$7500 on the purchase price thereof. This led to talk between Anderson, Miesse and Williams as to who should bear the loss of \$500 should the sale of <sup>the</sup> Idaho land be thus consummated, and though denied by him it was evidently agreed to, as claimed by Miesse and Williams, that it should be deducted from Anderson's commission of \$950, for it was not only so charged to him on their books but included in a statement of his account with the firm, made to him after the deal, showing a balance due him of \$37.50, which was then paid to and accepted by him.

But Anderson claims that Miesse individually owed him the commission on the sale of the Nock farm, and, to substantiate it, introduced a ~~contract~~ <sup>name</sup> executed by himself in the of Miesse to sell the farm to Donlea, and letters from Miesse to Nock, Donlea and the bank in which the purchase money for the farm was deposited, referring to Anderson as his agent and the farm as his purchase. These letters were written on the firm stationery, and notwithstanding the phraseology in the contract and letters referring to Miesse alone and not to Miesse & Co., yet Williams, with Anderson's knowledge, took part in the entire transaction, including negotiations for the purchase of the farm, and it is plainly manifest from the entire evidence that there was no intention on the part of Miesse or Williams to treat the matter otherwise than as a firm transaction, and that the use of Miesse's name alone was a mere matter of convenience in



closing deals for the benefit of the firm, and that Anderson must have so understood it.

Anderson testified to no express agreement on the part of Miesse to pay commission on the sale of the Nook farm, but said that he asked Miesse for commissions after the contract of sale, but Miesse emphatically denied it, and no implication of an agreement would arise from such request alone if made, especially in view of all the other facts and circumstances of record.

Taking the entire testimony together, which we have carefully considered, we think it clearly preponderates in favor of plaintiff in error to the effect that all either Anderson or Miesse did in respect to the purchase of the Nook farm was intended solely to bring about a sale to Nook of the Idaho land for the account of Miesse & Co., and that the services rendered by Anderson therein were to enable him to obtain a commission on such sale, and to effect it he was willing to reduce his net commission from \$850 to \$450. It was clearly a fire transaction, and no reason appears in the record why Miesse should personally pay a commission on the sale of the farm.

The judgment is reversed.

REVERSED.

Mr. Justice Clark took no part in the decision of this case.



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October Term, 1912. No.

184-18641

PAULINE SIESS,  
Defendant in Error,

vs.

ROBERT BANZULY,  
Plaintiff in Error.

ERROR TO MUNICIPAL

COURT OF CHICAGO.

183 I.A. 192

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The only question we are asked to consider on this writ of error is whether the evidence did not preponderate against the finding and judgment of the court in favor of Siess, plaintiff below, whose suit was based upon an alleged breach of an agreement by Banzuly, defendant, to employ her as a hat trimmer for a period of fourteen weeks at a salary of \$23 per week.

Plaintiff was discharged before the end of the period and judgment was given to her for what she would have earned under the contract during the entire period less what she was paid and had earned elsewhere after her discharge. The defense was that the contract for such period was upon the condition that plaintiff trim twenty hats per day after the fourth week of her employment, and that she failed and refused to do so. The agreement was oral and made with the wife of defendant, who testified that such condition was a part thereof, and in that she was supported by the testimony of a former employe who claimed to have been present when it was made. Plaintiff denied that any such condition was spoken of or assented to.

We are practically asked to reverse the judgment because there were two witnesses against one. Regardless of other evidence before the court, it is enough to say that the trial judge,

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who heard and saw the witnesses, had a better opportunity to determine their credibility than we have, and the weight of testimony is not determined by numbers alone. We shall not therefore disturb the judgment.

There was some testimony tending to show that the discharge was made for other reasons, but, in our judgment, it was not such as to affect the correctness of the court's finding, especially as it did not relate to the issues formed by the statement of claim and affidavit of merits.

The judgment is affirmed.

AFFIRMED.



319 - 12678

CHARLES M. HOFF, a minor, by  
WALTER F. SOMMERS, guardian,  
Appellee,

vs.

AMERICAN DEVELOPMENT COMPANY,  
a corporation,  
Appellant.

APPEAL FROM SUPERIOR

COURT, COOK COUNTY.

183 I.A. 192

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree pro confesso entered upon an amended bill of complaint and a plea thereto, supported by an answer, by which the defendant elected to stand. The bill charged that complainant, a minor, sustained personal injuries through the fault of defendant; that a suit therefor was begun by his father as next friend and tried in the Municipal Court of Chicago before a judge without a jury, and a finding and judgment for \$100 was entered for said minor August, 10, 1909; that the money was paid over to his father and the judgment satisfied; all of which it alleged was done in fraud of complainant's rights without his knowledge or approval, and prayed for general relief and that the judgment of the Municipal Court be set aside.

The plea alleged that on September 1, 1910, the minor, by his mother, filed a petition in said Municipal Court to vacate said judgment entered therein; that it set up the same matters as are alleged and relied upon in said bill of complaint; that the defendant filed an answer denying the matters in said petition; that a hearing was had thereon September 20, 1910, upon which the following order was entered.

"Ordered that this cause stand continued until Saturday, November 19, 1910, at 9:30 A. M., and conditioned that if \$100 is paid to the defendant by the father of plaintiff on or before that date, the judgment heretofore entered is to be vacated and new trial granted; if not, motion to vacate is to be denied."

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The plea further set up that no exception to or appeal from said order was taken by plaintiff in said action, or any one in his behalf; nor was the same ever complied with by him or any one for him, but that on November 22, 1910, pursuant to notice given, the guardian named in this proceeding as guardian of said minor, appeared before the judge, before whom all the said proceedings in the Municipal Court were had, and moved to vacate the judgment aforesaid, which was denied and that no exception to or appeal from such action was taken, and that the proceedings under said petition were similar in purpose and effect to the present action.

It is unnecessary to set forth the contents of the answer. The court held the plea supported thereby insufficient in law, overruled the same and entered a decree, annulling and setting aside said judgment in the Municipal Court.

It is apparent that the petition in the Municipal Court to vacate said judgment was filed pursuant to Section 21 of the Municipal Court Act, which confers upon that court the power to vacate a judgment entered therein upon the filing of a petition after a certain period that sets forth grounds "which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity." It was in the nature of an equitable proceeding of the same character and seeking the same relief as the bill herein. If therefore a final order or judgment was entered in such proceeding in the Municipal Court, it was a bar to the relief prayed for in said bill of complaint, and if it was not a final order, then it left the proceeding still pending in that court. Whether it was a final order was unnecessary to determine, for the allegations in the plea compelled the court under either view of it to sustain the plea and dismiss the bill. The decree will be reversed and the cause remanded for action in harmony with these views.

REVERSED AND REMANDED.

Mr. Justice Clark took no part in this decision.



237 - 18899

JACOB WEBER, SAMUEL WEBER and  
JULIA WEBER, as trustees of the  
estate of LOUIS WEBER, deceased,  
Defendants in Error,

vs.

JIM MOY,  
Plaintiff in Error.

ERROR TO MUNICIPAL  
COURT OF CHICAGO.

183 I.A. 200

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The questions for decision in this case arise upon a claim of set-off filed by plaintiff in error, Moy, to a claim for \$400 for rent by defendants in error which was united under provisions therefor in the Municipal Court Act, with an action of forcible detainer.

The lease to Moy ran from May 1, 1911, to April 30, 1912. Rent was payable in monthly installments in advance on the first day of each month. Moy failed to pay the rent for March and April, 1912, when it became due. After due service on him of notice, declaring the termination of the lease if the rent was not paid by April 11th, suit was commenced. Judgment for possession was entered on April 19th, and the issue upon the cause as to the rent was postponed to April 28th. Moy's set-off to the claim for rent alleged that he had never violated any of the terms and provisions of the lease except by failure to pay the installments of rent for said months of March and April, 1912, <sup>amounting to \$400;</sup> that the plaintiffs had suffered no other damage, and that he was willing to allow them the \$400 out of the sum of \$1000 that he had deposited with them under the terms of the lease as security. To his set-off an affidavit of merits was filed by plaintiffs claiming the right to forfeit the entire sum of \$1000, and the exercise of it for the breach of the terms of the lease in the failure to pay

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rent for the months of March and April, 1912. Upon the hearing the court entered judgment in favor of plaintiffs for \$400.

The facts are undisputed. The only question is one of law, namely, whether the sum aforesaid should be considered as a penalty or liquidated damages. The rule by which this must be determined is so well-settled that it needs no reiteration nor citation of authorities. The intention of the parties, as evinced in the written lease, must govern, regardless of the terms used to designate the deposit.

We shall refer to only such provisions of the lease as we deem necessary to consider to determine the intention of the parties. One provision reads:

"The lessee has this day deposited with the lessors One Thousand Dollars (\$1000), to be by them held as security for the faithful performance by the lessee of each and all of the terms, covenants and conditions of this lease, and it is understood and agreed by and between the parties hereto that for breach of any of the terms, covenants or conditions of this lease, the lessors shall have the right to forfeit the said sum of One Thousand Dollars (\$1,000), either with or without notice to the lessee \* \* \* ."

The lease further provides that should lessors forfeit the said sum for any such breach and the damages resulting therefrom shall exceed said sum, "then in such event said One Thousand Dollars (\$1,000) is not to be considered as having been forfeited in full liquidation of the lessors, but the lessors shall have the right to recover from the lessee \* \* \* any such further or other damages in excess of the sum of One Thousand Dollars (\$1,000) as may have been sustained by them."

The lease further provides that the lessors will pay the lessee interest on said sum, and that "the interest for the last year is to be paid over by the lessors to the lessee with the said sum of One Thousand Dollars (\$1,000) upon the termination by lapse of time of this lease; provided that in the meantime there has not been any forfeiture of the said sum of money to the lessors \* \* \* ."

No damages were proved or claimed in plaintiffs' de-





fence to the set-off other than the failure to pay the rent for the months of March and April.

The language employed in the lease admits of no doubt in our minds as to the intent of the parties. The sum was to be held as security for the performance of the covenants of the lease, thus giving it the character of an indemnity for any loss that might arise from a breach thereof with the consequent right of the lessee to the surplus remaining after satisfying such loss. The language for its forfeiture is no more explicit and emphatic than that relating to the penalty of a bond which is enforced only to the extent of the actual damages sustained if less than the amount of the penalty. (*Scotfield v. Tompkins*, 95 Ill. 190.) And, too, the fact that there is a provision in the lease that the lessors might recover for any damages in excess of \$1,000 is inconsistent with the theory that it should be regarded as liquidated damages for a breach of the contract. It would hardly be deemed mutual if so regarded as to defendant but not to plaintiff.

The leaning of the courts is toward such construction as to exclude the idea of liquidated damages and to permit the party to recover only such damages as he has actually suffered. (*Hennessey v. Metzger*, 158 Ill. 305.) Here the damages were fixed and certain. No other<sup>damages</sup> than the amount of rent for the months of March and April were claimed or could be claimed in view of the fact that the lessors elected to terminate the lease before the expiration of the month for which the last installment was due. Proof that the premises remained vacant after the lessee moved out on April 29, 1912, was properly ruled out. Plaintiffs could assert no right to damages accruing after they had voluntarily terminated the lease. The case therefore stands upon a showing of no damages sustained by plaintiffs except the loss of rent for March and April to indemnify plaintiffs against which they held security of \$800 in excess thereof. To permit them to retain said excess on the theory that damages might or did accrue to them,



after they had voluntarily terminated the lease, would be wholly unwarranted; and to permit them to retain the \$2000 when they had suffered damages to the extent only of \$400 would be unjust and unconscionable as well as contrary to the intention of the parties as manifested by the language of the lease.

The defendants in error, referring to the words "upon the termination by lapse of time of this lease," in one of its provisions contend that the action was prematurely brought before April 30, 1913. Inasmuch as plaintiff in error saw fit to terminate the lease before it would expire by lapse of time and before he had incurred damages to the extent of the sum deposited, the clause in question has no application to the facts of the case. True, they served notice of their intention to declare a forfeiture and refer to the proviso following the clause above cited, but the entire argument relative thereto involves the adoption of the theory of liquidated damages, and thus begs the question.

Nor because the lease contains no express agreement providing when and under what conditions the money pledged should be repaid does it call for the application of the doctrine that an implied contract cannot exist where there is an existing express contract about the same subject. In the absence of any express provisions relating to the return of the sum deposited as security, its very nature as such involves the obligation to return it when the occasion for its retention no longer exists.

Nor is it a case calling for the application of the principles requiring a party to a contract, seeking damages for non-performance by the other party, to allege and prove that he has complied with the provisions of the contract required to be performed by him.

The term 'forfeiture' used in the lease must be considered in its relation to the right to retain the \$2000 as indemnity and not as liquidated damages. The lease does not even use the term "liquidated damages" and "whether the term 'liquidated dam-

There is a very important question which arises in connection with the above, and which is of great importance in the study of the history of the world. It is the question of the origin of the human race. It is a question which has been discussed by philosophers and scientists for many centuries, and it is one which is still open to discussion.

The question of the origin of the human race is one which has been discussed by philosophers and scientists for many centuries, and it is one which is still open to discussion. It is a question which has been discussed by philosophers and scientists for many centuries, and it is one which is still open to discussion. It is a question which has been discussed by philosophers and scientists for many centuries, and it is one which is still open to discussion. It is a question which has been discussed by philosophers and scientists for many centuries, and it is one which is still open to discussion.

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ges' is used or not the idea of the courts is to ascertain, if possible, the actual damages sustained, and if it is possible to ascertain the actual damages, or if the amount of liquidated damages mentioned in the contract is exorbitant, the court will construe the amount as a penalty rather than as liquidated damages." (Radloff v. Heise, 196 Ill. 565; Poppers v. Vaughan, 148 id. 192.)

An examination of the lease indicates that while damage from breach of some of its conditions, such as the non-payment of rent, is capable of exact computation, yet the non-performance of other conditions therein named might not be measureable by any exact pecuniary standard. In such a case, where a sum of money is made payable in gross for the breach of any of them, such sum is held to be a penalty only and not liquidated damages. (Iroquois Furnace Co. v. Wilkin Mfg. Co., 121 Ill. 522; Trower et al. v. Elder, 77 id. 452.)

We think, therefore, the court erred in entering judgment for the plaintiffe, and that no other judgment could properly be entered upon the issues and facts of the case than one of \$800 for plaintiff in error, and such will be the judgment here.

REVERSED.



1887. It is a very old building, and has been used for many years as a school. It is now used as a school, and is a very good one. It is a very old building, and has been used for many years as a school. It is now used as a school, and is a very good one.

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J. CLINTON GRANT,  
Defendant in Error,

vs.

GEORGE SCHWARTZ,  
Plaintiff in Error.

ERROR TO MUNICIPAL  
COURT OF CHICAGO.

183 I.A. 202

MR. JUSTICE BARNER DELIVERED THE OPINION OF THE COURT.

An action of forcible detainer was brought by Grant for possession of certain rooms, leased by him to defendant, Schwartz, in which, by agreement, they were each to conduct an independent practice of dentistry, for the period of one year from March 1, 1912. On May 20, 1912, Grant served Schwartz with a notice to quit and deliver up possession of said premises to him on or before the thirty-first of May. Judgment for possession was rendered upon a verdict finding defendant guilty of unlawfully withholding from plaintiff the possession of such premises.

We have examined the record in vain to find any direct proof whatever relating to possession of said premises by defendant, and none whatever tending to show that he was in possession at the time suit was brought.

It has frequently been held that it is indispensable to the right to recover possession of premises in an action of forcible detainer to prove that the lessee, where no one is holding under him, was in actual possession of the premises at the time the suit was brought. (Murphy v. Dwyer, 11 Ill. App. 246; Hersey v. Westover, 11 id. 197; Preston v. Davis, 112 id. 636; Weiboldt v. Brewing Co., 163 id. 246.)

In the absence of such proof, the court should have granted defendant's motion to instruct the jury to find him not guilty. For failure so to do and to grant a motion for a new trial, the judgment will be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

THE UNIVERSITY OF CHICAGO  
CHICAGO, ILL.  
JANUARY 1882

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THE UNIVERSITY OF CHICAGO

It is the policy of the University of Chicago to  
maintain a high standard of scholarship and  
to provide for the advancement of the sciences  
and the arts. The University is committed to  
the highest quality of instruction and to the  
most thorough and complete training of its  
students. The University is also committed to  
the advancement of the sciences and the arts  
and to the highest quality of instruction and  
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The University of Chicago is committed to the  
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thorough and complete training of its students.  
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to the highest quality of instruction and to  
the most thorough and complete training of its  
students.

293 - 18755

JOSEPH CHOBOT,  
Appellant,

vs.

ANNA LAZNOVSKY,  
Appellee.

}  
} APPEAL FROM CIRCUIT  
}

COURT, COOK COUNTY.

183 I.A. 203

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from the dismissal of a bill in equity by which complainant elected to stand after a demurrer thereto was sustained.

It is unnecessary to set forth the bill at length. It prayed for an injunction restraining defendant from appropriating seven feet of an entrance or driveway forty-three feet wide, leading into certain premises part of which was leased by defendant's grantor to plaintiff for saloon purposes. From the indefinite and uncertain description of the premises given in the bill it is impossible to determine whether such driveway is embraced in the lease, or whether the seven feet <sup>is question</sup> is clearly necessary to the beneficial use or enjoyment of the premises leased, or whether complainant could be seriously injured by narrowing the entrance from forty-three to thirty-six feet, or whether if so narrowed, a way convenient for ordinary, necessary and reasonable use would not still remain.

But even if an injury to complainant might be inferred from the allegations in the bill, it sets forth no facts tending to show that the same is irreparable, or that the defendant is not able to respond to any judgment that might be obtained against her in an action at law.

But it further appears from a copy of the lease attached to the bill as an exhibit that it gives to the first party there-

1881.V.208

to "the right to enter said premises at any and all times, \* \* \* for the purpose of making alterations, additions and improvements by way deemed desirable, and the second party shall not be entitled to claim from the party of the first part any damages or rebate resulting from the making of any alterations, additions or enlargements to said building." It also appears that defendant gave notice of her purpose to exercise the right so reserved by enlarging one of the buildings bordering on said driveway so as to cover said seven feet.

The defects and want of equity in the bill thus referred to were specifically pointed out by the Answerer and the same was properly sustained.

Appellant argues that complainant had an easement ex necessitate in such Driveway. The bill contains nothing from which such a right can be implied. The decree of the court will be affirmed.

AFFIRMED.

1997



tober Term, 1912. No. 7

103 - 18550

RICHMOND-SMITH CO., a  
corporation,  
Plaintiff in Error,  
vs.  
WILLIAM J. RICHARDSON,  
Defendant in Error.

ERROR TO MUNICIPAL  
COURT OF CHICAGO.

183 I.A. 204

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

Suit was brought against the defendant in error and one Mat Anderson, as defendants, by plaintiff in error, as plaintiff, to recover the price of a certain quantity of milk alleged to have been sold and delivered to the defendants by the plaintiff. Service was not had upon Anderson, and the judgment was rendered in favor of Richardson, against whom this writ of error is prosecuted by the plaintiff.

On September 18, 1911, the defendants signed an order, apparently in the form of a letter addressed to the plaintiff, requesting plaintiff to have shipped daily nine cans of milk, describing it, to M. Anderson. The schedule of prices is given, and there is incorporated an agreement to receive the milk from October 1, 1911, to April 1, 1912, and to pay for the same on the 5th of each month for all shipments made during the preceding months. There are other provisions with respect to the return of cans, etc., not necessary to be set forth.

To the statement of claim setting up this contract and alleged performance on the part of the plaintiff, the defendant, Richardson, now defendant in error, filed a long recited affidavit of merits, claiming want of consideration and prior suit against Anderson, "that affiant is advised that the instrument sued on in this case has not the essential elements of a contract, \* \* \* that

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said contract is void for want of mutuality, in this, that it does not appear that any person or corporation ever agreed to deliver milk to said Mat Anderson."

At the trial it was conceded by the defendant that certain shipments of milk were sold by plaintiff to Anderson and Richardson upon a written order signed by the latter; that the sum of \$321.10 is due "upon which there is no dispute"; that Anderson and Richardson signed the order heretofore referred to; that the milk had been shipped and delivered to Anderson. An objection was sustained to the offering in evidence of the contract, and the court held that the defendant Richardson was a mere surety for Anderson, and that as to him the contract sued on must be strictly construed. The court also held at the request of the defendant that the "paper signed by Mat Anderson and the defendant herein is void for want of mutuality." The court held, third, that Richardson was not liable for the milk sued on, and was only liable, if at all, by virtue of the paper signed by him, and that being void for want of mutuality, the defendant Richardson was not liable at all; fourth, "that the defendant Richardson is liable herein, if at all, on the paper signed by him; and that being void, there is no liability thereon as against the defendant Richardson."

We agree with counsel for the plaintiff that the doctrine of suretyship has no application to the facts of this case, and that the contract was not void for want of mutuality, but was an original contract entered into jointly by Richardson and Anderson with the plaintiff. It was an order for milk to be delivered to Anderson. The milk was delivered. Thus the contract was fully performed by the plaintiff, and the liability for the milk at the contract price was fully established. *Combs v. Steele*, 92 Ill. 101; *Gustafson v. Swanson*, 131 Ill.App. 525.

While mention is made in the affidavit of merits of a previous recovery against Anderson, no proof of such fact, if it was a fact, was made in the case, and at the trial it was not re-



lied upon as a defense.

The judgment of the Municipal Court will be reversed and a judgment entered in this court in favor of the Pickens-Smith Co., plaintiff in error, and against the defendant in error, William J. Richardson, in the sum of \$321.50.

JUDGMENT OF MUNICIPAL COURT  
REVERSED AND JUDGMENT HERE.

1. The first of these is the

2. The second is the

3. The third is the

4. The fourth is the



208-18666

ANDREW KREINEK,  
Plaintiff in Error,

vs.

FRANK ZIMMERMANN,  
Defendant in Error.

ERROR TO MUNICIPAL

COURT OF CHICAGO.

183 I.A. 205

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

This writ of error brings up for review a judgment entered in favor of Frank Zimmermann as plaintiff, against Andrew Kreinek as defendant, upon a claim made by the former against the latter upon a guaranty alleged to have been entered into orally between the parties, whereby the defendant undertook to reimburse the plaintiff for any losses the latter might sustain by reason of his purchase from the former of a certain saloon business, and also for "divers sums of money paid out for stock by plaintiff."

The rule as to retaining in this court the title of the case as in the trial court has not been observed in the briefs and abstract.

In the brief of the defendant it is stated: "Plaintiff in error appeals because the testimony of defendant in error shows that it is false and that whatever loss was sustained by him was because of his own fault; and because the suit was brought and conducted as an action in assumpsit between partners where it should have been an action in accounting or in equity."

The guaranty, if made, was not a transaction between partners, but one between a vendor and a vendee.

While the evidence offered was not entirely satisfactory, we are unable, after a careful examination of the record to say that the verdict of the jury is against its manifest weight.

The judgment will be affirmed.

102-11881

238 - 18700

ALLIE M. BEST, Executrix of the  
Estate of Walter T. Best, other-  
wise known as E. Maro, deceased,  
Plaintiff in Error.

vs.

WILLIAM C. HUNTER,  
Defendant in Error.

ERROR TO CIRCUIT

COURT, COOK COUNTY.

183 I.A. 206

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

This is a suit in assumpsit, brought by the plaintiff in error (plaintiff) as executrix, against the defendant in error (defendant), for the sum of \$1,000. A demurrer to the declaration was sustained. From a judgment for costs against the plaintiff this writ of error is prosecuted.

The declaration sets up in habeo verba a letter from the defendant to the decedent, in which the writer, after acknowledging receipt of a letter from the decedent and expressing his intention of going to Idaho to look at some land, refers to a circular apparently enclosed, stating that every word in it is true; that the writer has an option on 100,000 shares, and that about 80% have been sold; offering to decedent some of the shares, and saying, "I will agree to take them back from you at any time within two years at the price you pay for them. I am owing you \$260. I have bought a great many of these shares and I can arrange for 4,000 shares for \$1,000 and string the payments along for five or six months, so that if it is satisfactory to you, you may send me \$40, which, with the \$260 I owe you, will pay for 4,000 shares, and this letter is my agreement that I will buy these shares back from you for \$1,000 any time you do not want them, within two years from date." The remainder of the letter it is unnecessary to recite, as it is largely in the nature of a repetition of what has already been





given. The declaration then proceeds to aver that the decedent, "relying upon the promise of said contract made and agreed to, did on or about the 12th day of June A. D. 1907, concurrently with the execution of said contract and as a consideration therefor, cause to be turned over to the said defendant \* \* \* notes to the amount of \$980 and a check for \$40 \* \* \* that afterwards, to-wit, on or about the 26th day of February, 1908, said Walter C. East, otherwise known as E. Ware, died"; that plaintiff qualified as executrix in the Probate Court of Leelanau County, Michigan, etc.

The declaration then sets forth in habeo verba a written notice purporting to have been sent by plaintiff to defendant at his office in Chicago, and notifying him of her election or determination to avail herself of the aforesaid agreement, in which notice there was recital to the effect that the shares of stock referred to were those of the "U. & P. Burlington Gold Mining & Milling Co."

There is also included in the declaration a form of affidavit as to service of a copy of the notice referred to upon the defendant.

The declaration proceeds to aver that the plaintiff had often requested the defendant to abide by the terms of the contract, that the defendant had refused so to do, and has refused to take back the stock, and has paid to the plaintiff the sum of \$1,000 for which claim is made.

A second count is added to the declaration, but in the view we take of the case its recitals need not be set forth. They are in all essential particulars the same as those in the first count.

The defendant bases his contention that the demurrer was properly sustained upon three grounds: first, that the alleged contract is uncertain and incomplete; second, that there is no averment in either count of the declaration that the 4,000 shares of stock offered to the testator of plaintiff in error in the latter

given. The Government then proposed to send the Committee  
reporting upon the results of the investigation to the  
on or about the 15th day of June A. D. 1900, and to  
submit to the Senate a report of the Committee, and  
to be printed and to be distributed to the members  
of the Senate and to the House of Representatives, and to  
the State of New York, and to the State of New Jersey,  
and to the State of New Hampshire, and to the State of  
New York, and to the State of New Jersey, and to the  
State of New Hampshire, and to the State of New York.

The Committee also were to be authorized to  
collect information in such cases as may be required in  
the office of the Secretary of the Senate, and to  
submit to the Senate a report of the Committee, and  
to be printed and to be distributed to the members  
of the Senate and to the House of Representatives, and  
to the State of New York, and to the State of New  
Jersey, and to the State of New Hampshire, and to the  
State of New York.

There is also authorized to the Committee a sum of  
Twenty thousand dollars, to be used for the purpose  
of carrying out the provisions of this act.

The Committee are authorized to employ such  
other persons as may be required in the office of the  
Secretary of the Senate, and to submit to the Senate  
a report of the Committee, and to be printed and to  
be distributed to the members of the Senate and to the  
House of Representatives, and to the State of New  
York, and to the State of New Jersey, and to the  
State of New Hampshire, and to the State of New York.

A second report is to be submitted to the Senate  
on or about the 15th day of June A. D. 1900, and to  
submit to the Senate a report of the Committee, and  
to be printed and to be distributed to the members  
of the Senate and to the House of Representatives, and  
to the State of New York, and to the State of New  
Jersey, and to the State of New Hampshire, and to the  
State of New York.

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other persons as may be required in the office of the  
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House of Representatives, and to the State of New  
York, and to the State of New Jersey, and to the  
State of New Hampshire, and to the State of New York.



from defendant in error were shares of the "U. & P. Burlington Gold Mining & Milling Company," or that any shares in this company were delivered by the defendant in error or received by the testator of the plaintiff in error from the defendant in error, in carrying out the alleged agreement in his letter; third, that the contract was not assignable, if there is held to be a contract, and the contract so not being assignable, ownership did not pass to the executrix as representing the estate.

Without passing upon the first and third points, we think it sufficient to say that the second point is in our opinion well taken. The declaration does not, as required by the rules of pleading, show the performance or the excuse for nonperformance of the act necessary to have been done or excused in order to establish the right of action in the plaintiff.

The judgment will be affirmed.

AFFIRMED.

Two children in arms were shown at the U. S. P. Building  
Gala Dining & Billiard Company, at that and others in this company  
and testified by the defendant in arms as testified by the latter  
son of the defendant in arms from the defendant in arms, in arms-  
ing out the alleged statement in the latter; third, that the son-  
street for the defendant in arms is said to be a witness, and  
the witness he was being examined, whether it is not good of the  
accusation as surrounding the matter.

"Without seeing upon the first and third nights, we  
also is sufficient to say that the second night is in our opinion  
well known. The defendant in arms will be testified by the police of  
Chicago, that the testimony of the witness for the defendant in  
arms is necessary in that case and in arms in arms in arms  
called the right of action in the defendant.

The judgment will be affirmed.

1917.

October Term, 1912. No. 7

254 - 18718

ASHLAND AUTO GARAGE, a corporation,  
Plaintiff in Error,

vs.

CHICAGO RAILWAY COMPANY, a corporation,  
Defendant in Error.

ERROR TO MUNICIPAL  
COURT OF CHICAGO.

183 I.A. 207

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

Suit was brought by plaintiff in error, as plaintiff, against defendant in error, as defendant, for damages alleged to have been occasioned by the negligence of the defendant to an automobile belonging to the plaintiff.

After the testimony for both parties had been received, the court directed a verdict in favor of the defendant, and judgment was entered in favor of the defendant for costs.

It is now too well established to be a matter of doubt, that the giving of a peremptory instruction directing the jury to find the defendant not guilty raises the question whether there is any evidence in the record fairly tending to support the action of the plaintiff, and where there is evidence which with all inferences that may be fairly drawn from it in favor of the plaintiff tends to establish a cause of action, the case is one for the determination of the jury and it is error to direct a verdict in favor of the defendant. In this case, as in all cases of negligence, it is incumbent upon the plaintiff to show that the defendant was guilty of negligence and that it, the plaintiff, was not itself guilty of contributory negligence.

705 .A.1881

In considering the question we find it unnecessary to refer to any of the testimony except that of Edward Diecco, the chauffeur, who was in charge of the automobile on the evening in question. He testified that on the 14th of January, 1911, about half past six or a quarter to seven, on the corner of Clark street and Ridge avenue, in the city of Chicago, he cranked his car, into which the persons renting it had placed themselves, and that he turned around and was looking in both directions, north and south, to see if a street car was coming; that he could not see one in either direction; that "I got in and pulled for about 15 or 20 feet. I heard a roar, and the next instant I was struck by a car. When I was struck by the car my front wheels were over on the northbound tracks and the rear wheels were on the south tracks. The saloon, where I took this party to dinner, was on the northwest corner of Clark street and Ridge avenue, and while they were in to dinner my car was standing on the west side of Clark street facing south. \* \* \* I could see about three blocks north. I was prevented from seeing any further, as Clark street has a kind of a turn there. From the time I stepped into my automobile until I was struck by the car was about two minutes. It was just getting dark. All the lights of my car were lighted up. \* \* \* When I was struck my automobile was thrown into a barnyard between some posts in the fence. My automobile went across Clark street in a southeast direction, and when the street car struck it, it went something in a southeast direction into the barnyard. It went all across Clark street and about 100 feet in the barnyard. \* \* \* When my front wheels were on the northbound tracks I heard the car coming but it was too late to get out of the way. \* \* \* The machine I had was a Thomas limousine; it was a closed taxicab with a top on it."

In our opinion the plaintiff failed to show that its employe in charge of the car, namely the chauffeur, was in the exercise of due care. He says it was about two minutes from the time he stepped into the automobile until it was struck by the street







car. If he remained in the automobile two minutes before leaving it, and then went directly upon the track, he was guilty of contributory negligence as a matter of law, for not again looking and seeing that there was no car approaching before he started across the tracks. The closing sentence of his cross-examination is as follows: "The first time that I saw the street car was when it hit me." It is quite apparent from his own testimony that if he had looked he would have seen the car before attempting to cross the track.

We are further of the opinion that negligence on the part of the defendant was not established.

The trial court correctly directed a verdict in favor of the defendant and the judgment will be affirmed.

AFFIRMED.

and. It is included in the manuscript of the second volume (1811).  
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41 - 18476.

JAMES S. DEMING,  
Plaintiff in Error,

vs.

AGNES GRUNENBERG,  
Defendant in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

183 I.A. 208

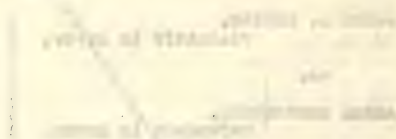
MR. PRESIDING JUSTICE MCSURELY

DELIVERED THE OPINION OF THE COURT.

This is a suit brought by Deming against the defendant, Mrs. Agnes Grunenberg, on seven promissory notes signed by her, due at certain intervals, aggregating \$255. After a trial by the court judgment was entered for the plaintiff in the sum of \$24.46, which the plaintiff insists was improper in that the judgment should have been for the full amount shown to be due by the notes themselves.

While the notes are made payable to the order of J. S. Deming, the plaintiff, yet the case was tried before the court upon the theory that he was only the nominal plaintiff, and that the notes, in essence and fact, were the property of L. A. Thiel. Upon this theory the defendant was permitted to show that some two years before the making of these notes she had borrowed \$175 from L. A. Thiel, for which she gave her notes secured by a chattel mortgage. At this time she conducted a millinery business on West Madison street, Chicago, and by agreement with Thiel she was permitted to repay this loan with merchandise, which was delivered to various parties under written orders from Thiel. The character of the transaction is indicated from the fact that it is clearly shown from the evidence that the defendant was obligated to pay interest at the rate of two per cent. per month. The evidence concerning the credits on her obligation by the delivery of millinery upon Thiel's orders, indicates that at the time of the making

1831.A.209



This is a very simple sketch of a landscape, showing a few lines for the horizon and some shapes for trees or buildings. The drawing is very light and appears to be a preliminary sketch or a study for a larger work.

The sketch is very simple, showing a few lines for the horizon and some shapes for trees or buildings. The drawing is very light and appears to be a preliminary sketch or a study for a larger work. The lines are thin and the overall impression is one of a quick, gestural drawing.

of the notes upon which this suit is brought, most, if not all, of the principal borrowed by her had been repaid.

The defendant testified that at the time of signing the notes and mortgage in question, the plaintiff asked her to sign the mortgage "to protect him and me," and that she signed them at the request of Thiel, although she never received a cent from this mortgage; that she never got any money from Deming, the plaintiff, and never knew him; that Thiel told her that he, Thiel, was going to Europe and that Mr. Deming would look after his business while he was away, but that she did not know that Mr. Deming's name was in the notes.

It is argued by plaintiff's counsel that the court erred in forcing the plaintiff to trial before the affidavit of merits was brought into court. It appears that the affidavit of merits was on file before the trial and was brought into court by a clerk during the trial. We do not think that plaintiff was harmed by the temporary absence from the courtroom of the affidavit of merits, and we think the motion of plaintiff's counsel to strike the affidavit of merits from the files was properly overruled.

It is undoubtedly true, as is claimed, that one not a party to an alleged fraud cannot be made to suffer, but we do not think this rule is applicable in this case. The trial court was evidently of the opinion that the notes did not in fact belong to J. J. Deming but to L. A. Thiel, and in so holding we think the court was abundantly justified from all the facts and circumstances in evidence, one of the material facts being that after the execution and delivery of the notes sued on, payments were made both in cash and in merchandise to Thiel, as was done under the prior notes, which were accepted by Thiel.

We think the prima facie case for Deming's ownership of the notes, made by the introduction of the same in the first instance, was overcome by other facts subsequently appearing upon







the trial.

It is also argued that the burden of proof in establishing the alleged fraud or want of consideration was upon the defendant; and of this there is no doubt.

The record is not wholly clear as to all the items sought to be proved upon the trial, but sufficient does appear to justify the conclusion of the trial court that the amount called for by the notes in question did not represent the correct amount of any indebtedness there might be due from Mrs. Grunenberg to Thiel.

We do not think it was error to receive in evidence the memoranda cards or orders sent by Thiel to the defendant upon which she delivered merchandise, as above described.

In the endeavor to arrive at a conclusion in strict accordance with justice between the parties, the trial court treated the entire transaction primarily and substantially as one between defendant, Mrs. Grunenberg, and Mr. Thiel, and in accordance with the same principle attempted to make a fair accounting between the parties, allowing defendant as a credit what the evidence showed she had paid, while at the same time disallowing to Thiel the usurious rate of interest. To assent to plaintiff's contentions would mean our approval of a situation where the defendant would be subject to a judgment and execution for an amount considerably in excess of the amount she had borrowed, in spite of the fact that it was manifest that she had repaid most if not all of the loan.

We are of the opinion that by the finding and judgment of the trial court substantial justice was done between the parties, and the judgment will be affirmed.

AFFIRMED.

the first.

It is also suggested that the Bureau be given the authority to issue subpoenas for the production of documents and the taking of depositions, and that it be given the power to make arrests.

The report is not finally closed as to all the items mentioned in the present report, but the following items appear to be finally determined: the Bureau shall have the authority to issue subpoenas for the production of documents and the taking of depositions, and to make arrests. It is also suggested that the Bureau be given the authority to issue subpoenas for the production of documents and the taking of depositions, and to make arrests.

monetary value of the property seized by the Bureau, and to make arrests.

which are not subject to seizure, as items described.

in the evidence in cases of a conviction in cases of

persons with federal bonds for political, the trial court should be given the authority to issue subpoenas for the production of documents and the taking of depositions, and to make arrests.

Attorney, Mr. Thompson, and Mr. Hall, and to make arrests. The same principle should be applied to cases of political persons.

political, allowing testimony as to what was the evidence shown.

the fact that, while at the same time, the evidence is not the same.

two sets of interests. The second set of interests would be the same.

mean one agreement of a statement made by the Bureau would be the same.

not be a judgment and execution for an amount exceeding in

amount of the amount the law requires, in order to the fact that

it was realized that the law requires that it not all of the law.

the law of the United States by the United States and Congress

347 - 17,883.

T. S. HOWELL,  
Appellee,

vs.

EMPIRE STATE SURETY COMPANY,  
a corporation existing under  
and by virtue of the laws of  
New York,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

183 I.A. 220

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

Appellee, T. S. Howell, recovered a judgment against appellant for \$1770.00, being the amount, with interest, claimed to be due to appellee under the terms of a contract entered into between him and appellant for furnishing mill work for the State Agricultural Building at Ames, Iowa. As we have concluded that there must be another trial on account of the errors hereinafter stated, it will be unnecessary to give more than a brief outline of the facts. It appears that in 1907, one Henry A. Schleuter had entered into a contract with the trustees of the Iowa State College for the erection of the building and that appellee, as a sub-contractor, had agreed with Schleuter to furnish the mill work. Appellant had given a bond for the due performance by Schleuter of his contract. Schleuter failed in September, 1907, after a small portion of the mill work had been delivered. Appellant assumed the burden of finishing the building, and on April 16, 1908, entered into a new contract with appellee which was substantially the same as the original contract between Schleuter and appellee, with the following additional provision: "It is also understood and agreed that all payments made by Henry A. Schleuter or the owner, previous to April 16th, 1908, for material furnished for the buildings referred to in this contract, under a former contract made between Henry A. Schleuter

1881. A. 250



and the contractor, are to be deducted from the amount of this contract." Appellee furnished the remainder of the mill work as provided by this second contract and received from appellant all the payments therein stipulated to be made except the sum of \$1500, which appellant refused to pay on the ground that it had been paid to appellee by Schleuter. To prove the fact of such payment appellant introduced a voucher and receipt signed by appellee in July, 1907. The voucher reads: "To payment on account of millwork for Agricultural Hall, \$1500"; and the receipt appended thereto reads: "Received of Henry W. Schleuter Fifteen Hundred and no/100----Dollars in full payment as per statement above." It was shown, however, that appellee did not receive \$1500 in money at the time of the execution of this voucher and receipt, but that he received two notes for that amount, which notes, appellee claimed, were not intended as payment, but were only for temporary use.

Appellant relies for its defense entirely upon the voucher and receipt, and its counsel contend that the word "payment", as used therein, is conclusive evidence of payment. It is urged that a receipt may be both a receipt and a contract, and that while a document which is only a receipt may be explained by oral testimony, one which is a contract as well as a receipt cannot be so explained or varied by parol evidence. A receipt, according to Webster's Dictionary, is a written "acknowledgement of payment", and the voucher and receipt in evidence in this case is nothing more than a receipted bill or statement of account. Nearly all such receipts contain the words "received payment", and if the word "payment" could be given the conclusive effect claimed for it by appellant's counsel, no ordinary receipt or receipted bill could be explained. None of the cases cited by counsel announce a doctrine which is as broad as this,

[illegible]



nor do we know of any case which so holds. We think there was no error in the ruling of the court in admitting oral evidence as to the circumstances under which the voucher and receipt were given for the purpose of showing the real intention of the parties at the time the receipt was given.

It is urged that the oral instructions given by the trial court were contradictory, misleading and erroneous. We are of the opinion that this error is well assigned. In one part of the oral charge the court referred to the giving of the notes or the receipt as though it were claimed by appellant that the receipt was given and the notes accepted "in full settlement of the debt in controversy." This was misleading because the "debt in controversy" in this case had no existence when the notes were given and the receipt executed. In one paragraph, the court told the jury that if they believed from the evidence that "plaintiff did the work for which this suit was brought" - which was admitted - and "that the defendant has not paid \* \* \* for some part of the same, and further, that the receipt \* \* \* was given for notes \* \* \* which notes the evidence shows not to have been paid, then the jury should find for the plaintiff." This practically directs a verdict for the plaintiff, for there was no claim that the notes were ever paid. In several other places the court referred to a payment by "the defendant" of the \$1500 in dispute. The claim was that it was paid by Schleuter, and these references to payment by the defendant are most confusing. A more serious error, however, was made when the court, after charging the jury that the burden of showing payment was upon the defendant, added this statement: "And he must satisfy you by a fair preponderance of the evidence that giving and acceptance of such notes by the plaintiff constituted a payment in full of the \$1500 sued for in this action." That in civil cases the jury are not required to

[illegible]

be "satisfied" that a particular claim has been proved is conceded by appellee's counsel, and is too well settled to require the citation of authorities. Counsel for appellee insist, however, that when the whole charge is considered, it is unlikely that the jury would attach much importance to the word "satisfy" as thus used. We have carefully examined the whole charge and find that in no other clause or paragraph is there any language which can be construed as correcting or explaining the statement that the defendant "must satisfy" the jury that the notes in question were given and accepted as a payment. In the state of the record before us, it is quite possible that the jury may have believed from all the evidence that appellee accepted the notes as a payment on account and yet, under this portion of the instructions, may have concluded that they were not permitted to so find unless they were fully satisfied that such was the fact.

Notwithstanding these errors in instructions, we are asked not to reverse the judgment, because, it is said, the merits of the controversy are clearly with appellee. The evidence was conflicting and, without expressing any opinion upon the weight of the evidence, it will be sufficient to say that, in our opinion, there is evidence in the record which, if believed by the jury, would have justified a different verdict. Where such is the fact, the manifest errors in the instructions cannot be considered as harmless.

We may also add, that in view of the apparently uncontradicted evidence of one witness to the effect that appellee was given to understand before he signed the contract with appellant that appellant would insist that appellee had been paid \$1800 by Schleuter, the instruction as to the allowance of interest was erroneous. If appellee was in fact so advised before signing the contract, the mere fact that appellant contested



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appellee's claim does not constitute unreasonable and vexatious delay in payment.

For the reasons indicated, the judgment of the Municipal Court will be reversed and the cause remanded.

REVERSED AND REMANDED.





March Term, 1912, No.

390 - 18,435.

JOHN A. WATSON,  
Appellee,

vs.

WILBEN MERCANTILE AGENCY,  
Appellant.

APPEAL FROM

COUNTY COURT

COOK COUNTY.

183 I.A. 231

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This suit was brought in the County Court by appellee, John A. Watson, to recover attorney's fees for services claimed to have been rendered to appellant at its request. The case was tried before a jury and a verdict rendered in favor of appellee and from a judgment thereon the defendant appeals.

The chief matter in dispute in the trial court was as to whether appellee was employed to act for appellant and on its behalf, or otherwise. It appears that appellant, whose business is that of collecting debts, received through its New York agents a claim held by one Shelton O. Burr, evidenced by certain notes and a trust deed securing the same. At that time appellant had in its employ a firm of attorneys and the matter of the Burr claim was placed in the hands of one Maurice E. Seitz, a member of that firm. The secretary of appellant corporation was also a member of the same firm. Seitz filed a bill to foreclose on behalf of Burr, and the principal defendant, Edna J. Tobey, filed a cross-bill, in which she alleged that the notes and trust deed had been obtained by fraud on the part of her husband, Charles H. Tobey, and that the notes were assigned to the complainant, Burr, with knowledge of such fraud. Seitz, as solicitor for the complainant, apparently deemed it important that Charles H. Tobey should be represented by counsel and should answer the charges contained in the cross-bill. Seitz claims that he thereupon communicated with the representatives

182 J. 1181

or attorneys of Tobey in New York and obtained from them authority to employ an attorney to represent Tobey in the foreclosure suit and that, acting upon this authority, he engaged appellee as solicitor for Tobey, informing him fully at the same time as to the nature, extent and source of his (Seitz) authority so to do. Appellee claims, on the other hand, that he was employed by Seitz to act for appellant. He denied that Seitz acted as agent for Tobey in hiring him, and denied that he was so informed by Seitz. There is a sharp conflict in the evidence upon this point, and it was therefore important that the instructions relating to this issue of fact should be reasonably accurate and not misleading.

The first instruction given to the jury, on behalf of appellee, told the jury: "If you believe from the evidence that Charles H. Wilber, the secretary of the Wilber Mercantile Agency, had knowledge of the fact that the plaintiff was employed by Seitz, and if you believe that plaintiff was so employed, to render the services performed, then you should find for the plaintiff." It is a familiar rule of law that where an instruction assumes to direct a verdict if the jury believe from the evidence that certain stated facts are true, it is error to omit from the hypothesis any material disputed element of fact as to which there is any competent evidence, and that such an error cannot be cured by other instructions. By this instruction the right of appellee to recover was affirmed if the jury believed two facts were proved, namely- that appellee was employed by Seitz to render the services performed and that the secretary of appellant had knowledge of that fact. In view of the evidence of Seitz, the mere proof of the two facts mentioned was not sufficient to entitle appellee to recover from appellant, for it was also necessary to show that such employment by Seitz was an employment for and on behalf of



the appellant. This element, which was the main subject of controversy, was entirely ignored by this instruction. In view of the conflict in the evidence on this point the error in this instruction was clearly prejudicial.

A number of other alleged errors have been assigned, but these become unimportant in the light of our conclusion as to the effect of the first instruction.

For the error indicated, the judgment of the County Court will be reversed and the cause remanded.

REVERSED AND REMANDED.







y8.

SPRING VALLEY COAL COMPANY,  
Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

183 I.A. 232

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

Appellee, a coal miner in appellant's employ, recovered a judgment against appellant for \$2500 for damages for personal injuries received while at work in appellant's coal mine. The suit was brought on the theory that the injury to appellee was caused by a willful failure on the part of appellant to comply with the requirements of sections 16 and 18 of the "Mines and Miners Act" (Rev. Stat. Ill. Chap. 93). There are two counts in the declaration. The first count avers that appellant willfully failed to provide appellee upon his demand with a sufficient supply of props, delivered at the usual place, of suitable lengths and dimensions for securing the roof of the "room" in which appellee was working. The second count attributes the accident to the willful failure of appellant to perform the several duties which section 18 of the Miners Act requires the mine examiner to do and perform.

It appears from the evidence that appellee was injured soon after he had "taken down a break of coal". He claims that while he was shoveling away the coal which fell when the "break" occurred, a portion of the rock in the roof of the "room" in which he was working fell upon him and injured him. He also claims that he had noticed an unsafe condition in the roof prior to that time, but that he had no suitable props with which to make it safe, and that although he had demanded props of the "driver", the "pit boss", the "face boss" and the mine manager, no suitable



props were furnished for his use. Appellant had established and posted a rule requiring its men to make their demands for props, when needed, upon the manager of the mine. There was considerable evidence, however, to the effect that it was customary in appellant's mine for the miners to first ask the driver for such props, and if they were not furnished by him, then to ask the mine manager; but counsel for appellant insist that there is no evidence tending to show that any such custom was established by the appellant, and therefore contend that all evidence as to a demand upon the driver was inadmissible. They also contend that such evidence should have been excluded upon the further ground that no such custom was pleaded.

In Donk Bros. Coal & Coke Co. v. Peton, 192 Ill. 41, it was held that where there was a custom or usage, established by the owner of the mine, as to the manner in which the miner should make his demand for props, a demand made in accordance with such established custom or usage was a sufficient demand on the mine manager within the meaning of the statute. Upon the authority of that case, it was proper for appellee to show, if he could, that he had made his demand for props in accordance with a custom "adopted and in general use" at the mine in question. It was not necessary to plead a custom of that sort, for the reason that proof of the existence and observance of such a custom is one method of proving the allegation of the declaration that a demand was made upon the defendant.

In Henrietta Coal Co. v. Martin, 221 Ill. 460, it was held that in the absence of any proof of such a custom as was shown in the Peton case, supra, it was error to admit evidence of a demand made upon the driver; but the court also held that the error was cured by an instruction specifically stating that there could be no recovery unless the plaintiff had shown, by a





preponderance of the evidence, that he demanded props of the mine manager. In the present case the court, by numerous instructions, told the jury that a demand for props must be shown, and in one instruction, that the demand must be a "proper" demand made long enough before the injury to have enabled the defendant, by exercising ordinary care and diligence, to have supplied the plaintiff with props. But in none of the instructions given was there any statement as to what constitutes, under the law, a proper demand, nor were the jury told upon whom the demand must be made. In view of the evidence as to the custom which, it was claimed, prevailed at appellant's mine, the jury might easily conclude from the instructions given, that any unsatisfied demand, made upon any agent or employee of the defendant, would be sufficient to charge the defendant with liability for a failure to furnish props. To cover this point, appellant offered an instruction, which was refused, to the effect that under the statute the demand must be made on the mine manager, and that if a demand was made on the driver or any person other than the mine manager, such a demand would not be sufficient under the statute, unless it was communicated by such person to the mine manager, or was made on the driver, or other person, "pursuant to an established and recognized custom". This instruction contains a correct statement of the law, and was applicable to the evidence. The principle therein stated is not covered by any instruction that was given, and because of the refusal of the instruction offered, the jury were not informed as to the legal effect of the evidence relating to the alleged custom. The offered instruction was intended to supply that omission, and in our opinion the refusal of the court to give it was reversible error in this case.

The judgment will therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

[illegible]



38 - 18472.

GEORGE GOUGH,  
Defendant in Error,

vs.

A. W. BENSINGER,  
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

183 I.A. 234

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment in the Municipal Court against defendant for \$48.50 for wages found to be due, and the court taxed the costs, including \$10 attorney's fees against the defendant. The case was tried by the court without a jury. The defendant claims that the finding of the court is contrary to the evidence, and that the allowance of attorney's fees was improper, because no proof was made that a written demand was served three days before the bringing of the suit.

We have read not only the abstract, but the full stenographic report of the evidence. The evidence is conflicting. If the court believed the evidence of the plaintiff, the finding was correct; if it believed that of the defendant, the finding should have been in his favor. We find no fact or circumstance in the record which gives more weight to the defendant's denials than to the plaintiff's assertions. The trial judge saw and heard the witnesses, and apparently found as he did without hesitation. We cannot say his conclusion is manifestly wrong.

The plaintiff's verified statement of claim alleged that a written demand had been made upon defendant for the payment of \$48.50 more than three days before the suit was brought. This was not denied by the defendant's affidavit of merits. It therefore stood admitted of record, and the plaintiff was thereby relieved of the necessity of making affirmative proof of such an admitted fact.

The judgment will be affirmed.

AFFIRMED.

1881.1.284

61 - 18500.

M. E. GRAVES,  
Defendant in Error,

vs.

GEORGE A. NEEVES,  
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

183 I.A. 235

MR. JUSTICE WITON DELIVERED THE OPINION OF THE COURT.

The plaintiff, M. E. Graves, sued the defendant, George A. Neeves, on a promissory note, signed by Neeves and another, for \$185.25, upon which Neeves had paid \$75. The note provides for attorney's fees, if it is not paid when due. Plaintiff recovered a judgment for \$136.37, which was the amount of the face of the note with interest and \$25 attorney's fees, less the \$75 paid. It appears from the evidence that the note was given in payment of certain goods sold at auction by the plaintiff, as auctioneer on behalf of one James W. Groomes, to the defendant, and was made payable to Groomes; that after receiving the note, Groomes and the plaintiff went to a bank, where Groomes indorsed the note in blank and asked the bank to discount it. The bank declined to do so, whereupon the plaintiff wrote his name on the back of the note, underneath the name of the payee Groomes. Upon the strength of the plaintiff's indorsement, the bank discounted the note and paid the proceeds to Groomes. When it became due, it was not paid by the makers, and the plaintiff was obliged to, and did, "take it up", by paying the amount due to the bank, which thereupon delivered the note to the plaintiff.

It is claimed that these facts and circumstances show that the plaintiff's indorsement of the note was a guaranty, and it is urged that because this alleged guaranty was made without any request on the part of the defendant, the plaintiff is a mere



volunteer and cannot recover. We think there is no merit in the contention. When the plaintiff was obliged to take up the note, he succeeded to all the rights of the bank, and became the owner of the note, by purchase from the bank. Hartsel v. McClurg, 54 Neb. 316; Shaw v. Knox, 98 Mass. 214; McGregory v. McGregor, 107 Mass. 545. Even if it could be held that the plaintiff's indorsement amounted to a guaranty (which in our opinion was not the legal effect of the transaction), it does not follow that he was a mere volunteer when he "took up" the note. By indorsing the note he became obligated to the bank, and his payment to the bank was not for the purpose of paying defendant's obligation, but of discharging his own obligation under his contract with the bank. That transaction amounted to an assignment of the note to the plaintiff, and he thereby took the legal title to the note, with the right to recover from the makers. Volitz v. National Bank of Illinois, 138 Ill. 532.

It is also urged that the court erred in allowing attorney's fees. The note provided for such fees, and where such is the fact, it is proper to include the amount thereof in the finding and judgment. Barton v. Farmers National Bank, 122 Ill. 362; National Bank of Danison v. Danahy, 28 Ill. App. 92; Ricker v. Scofield, 28 Ill. App. 32.

The judgment of the Municipal Court will be affirmed.

AFFIRMED.



The first of these is the fact that the Government has not yet  
 decided whether it will accept the offer of the United States  
 Government to purchase the Alaska territory. The second is the  
 fact that the Government has not yet decided whether it will  
 accept the offer of the United States Government to purchase the  
 Hawaiian Islands. The third is the fact that the Government  
 has not yet decided whether it will accept the offer of the  
 United States Government to purchase the Philippines. The fourth  
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 will accept the offer of the United States Government to purchase  
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 Caroline Islands. The tenth is the fact that the Government  
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 eleventh is the fact that the Government has not yet decided  
 whether it will accept the offer of the United States Government  
 to purchase the Palau Islands. The twelfth is the fact that the  
 Government has not yet decided whether it will accept the offer  
 of the United States Government to purchase the Yap Islands. The  
 thirteenth is the fact that the Government has not yet decided  
 whether it will accept the offer of the United States Government  
 to purchase the Chuco Islands. The fourteenth is the fact that  
 the Government has not yet decided whether it will accept the  
 offer of the United States Government to purchase the Borneo  
 Islands. The fifteenth is the fact that the Government has not  
 yet decided whether it will accept the offer of the United States  
 Government to purchase the Celebes Islands. The sixteenth is the  
 fact that the Government has not yet decided whether it will  
 accept the offer of the United States Government to purchase the  
 Molucca Islands. The seventeenth is the fact that the Government  
 has not yet decided whether it will accept the offer of the United  
 States Government to purchase the Sulu Islands. The eighteenth  
 is the fact that the Government has not yet decided whether it  
 will accept the offer of the United States Government to purchase  
 the Mindanao Islands. The nineteenth is the fact that the  
 Government has not yet decided whether it will accept the offer  
 of the United States Government to purchase the Irian Islands.



104 - 18551.

NORTHWESTERN UNIVERSITY,  
a Corporation,  
Defendant in Error,

vs.

JOHN HUGHES,  
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

183 I.A. 236

MR. JUSTICE RITCH DELIVERED THE OPINION OF THE COURT.

Defendant in error recovered a judgment in the Municipal court for possession of certain premises occupied by the plaintiff in error, and this writ of error is brought to reverse that judgment. It appears from the evidence that from May to September, 1911, plaintiff in error occupied the premises in question under a written lease under seal, dated February 1, 1911, running for five years from May 1, 1911. The lessor's signature to the lease was as follows: "Mrs. J. Roche, (seal) Richard A. Roche, Attorney, (seal)". Richard A. Roche is the son of Mrs. J. Roche, the then owner of the property, and he signed both names to the lease. It appears that Mrs. Roche had verbally authorized her son to execute a lease to the plaintiff in error for one or two years, but had never given him any authority, oral or in writing, to execute a lease in her name for five years. Plaintiff in error paid rent to Mrs. Roche for several months, and she gave him receipts therefor, signed by herself in person. In August, 1911, she sold the property to the State Bank of Chicago. On September 29, 1911, the latter served on the plaintiff in error a notice to quit and surrender possession of the premises at the expiration of the month of October, 1911. On his failure to yield possession at that time, defendant in error, who had become the owner of the premises, brought suit for possession. After hearing the evidence, the court directed the jury to find a verdict for the plaintiff.



It is not contended that there was any proof tending to show that Richard Roche had any authority in writing to execute the lease, but plaintiff in error contends that the trial court should have permitted the case to go to the jury "to determine whether the facts constituted a direct authorization of the signing of the lease for and by Bridget Roche, and a subsequent ratification in person by her direct participation in the act of receiving and receipting for rent under the lease". The lease was voidable by the express terms of the statute of frauds, and its invalidity in that respect was insisted upon in the trial court when it was offered in evidence as a defense to the suit for possession. There was no disputed question of fact to be submitted to the jury. The facts were admitted and the question was one of law purely. Plaintiff in error having entered into possession and paid rent monthly under a lease which was voidable under the statute, became a tenant from month to month, and was entitled to a 30 days' notice to quit. Warner v. Hale, 25 Ill. 395. Such a notice was given him and at the expiration of the time specified, defendant in error was legally entitled to possession. The alleged "ratification" by Mrs. Roche amounted to nothing more than a partial performance of an invalid contract. Such part performance will not, in a court of law, avoid the statute. Warr v. Ray, 151 Ill. 340.

Counsel urge that the recovery permits the statute of frauds to be used to perpetrate a fraud. No fraud is shown by the evidence. Mrs. Roche testified that when the lease was given to her by her son she did not examine its contents and supposed it was a lease for one or two years. There is no evidence to the contrary. Where a party deals with an agent, he is bound to know the extent of the agent's authority; and in cases like this, he



is also bound to take notice that the agent's authority must be in writing. A mere neglect to inform the plaintiff in error of facts which it was his duty to ascertain, is not a fraud, in the absence of proof of any fiduciary relation between the parties.

Finding no reversible error in the record, the judgment will be affirmed.

AFFIRMED.

Mr. Justice Bradley took no part in the decision of this case.





155 - 18611.

ANTON JAGGLE,  
Plaintiff in Error,

vs.

P. G. KAISER,  
Defendant in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

183 I.A. 241

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

In this case, the facts are identical with those recited in Jaggle v. Eagle, No. 18610. The motion to strike the stenographic report from the record will be allowed, for the reasons stated in the opinion in that case; and there being no error in the record in other respects, the judgment will be affirmed.

AFFIRMED.



JAMES TAYLOR and MILDRED  
J. TAYLOR,

Appellees,

vs.

SIMON HAMBERG,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

183 I.A. 241

STATEMENT OF THE CASE. This is an appeal from a judgment of the Superior court of Cook county, for \$84,212.65, rendered December 4, 1911, upon the verdict of a jury against Simon Hamberg, defendant below, and in favor of James Taylor and Mildred J. Taylor, plaintiffs below, in an action for damages for fraud and deceit.

Plaintiffs were dry-goods merchants, and operated two stores, one situated at No. 378 (old No.) West Madison street, known as the "Golden Rule", and the other situated at No. 1296-1300 (old No.) West Madison street, Chicago. The first named store was managed by the plaintiff James Taylor and the other store by the plaintiff Mildred J. Taylor, who was the wife of James Taylor. In the latter part of the year 1906, Mrs. Taylor became ill and unable to continue her personal management of the last named store and plaintiffs decided to sell the stock and fixtures in the store for cash or in trade for land. The defendant Hamberg was in the business of trading real estate and merchandise, and had been so engaged almost exclusively for a period of ten years. On or about January 27, 1909, after negotiations had during said month of January, the plaintiffs executed and delivered a bill of sale to the defendant of all stock and fixtures contained in said last named store, including the good will of the business and whatever rights plaintiffs had in the leasehold of the premises, and received in exchange therefor a warranty deed, executed by the defendant and running to James

152 .A.1381

Taylor, as grantee, for seven sections of land in North Dakota, viz: Sections 1, 3 and 5 in Township 146, Range 93, and Sections 3, 5, 7 and 9 in Township 146, Range 94, all located in Dunn county, State of North Dakota. At the time of this trade the defendant did not have a good title to said land, although, as James Taylor testified, he represented to Taylor that he did. In June, 1908, Hamberg, in exchange for an equity in an apartment building in the City of Chicago and about \$2000 in cash, had received from the Northern Blue Grass Land Co., a Wisconsin corporation, a warranty deed to 18 1/2 sections of land in said Dunn county, which sections included the 7 sections deeded to James Taylor as aforesaid. At this time the Blue Grass Co. had no deed to said sections but had contracts with the Big Bend Land Co., of Wisconsin, for the purchase of many acres of land in said Dunn county, including said 18 1/2 sections, and said Big Bend Co., in turn, had contracts to purchase the same lands under certain terms and conditions from the Northwestern Improvement Co., a corporation organized for the purpose of selling lands on behalf of the Northern Pacific Railroad Company. It thus appears that at the time of making said trade the title to said 18 1/2 sections was in the Northwestern Improvement Co., and that neither the Big Bend Co., the Blue Grass Co., nor the defendant, Hamberg, had any right to a conveyance of said sections until the various terms of the original contract between the Big Bend Co. and the Northwestern Improvement Co. had been performed by the Big Bend Co.

Plaintiffs began their suit on June 8, 1909, and filed a declaration consisting of one count. To this count the defendant filed a general and special demurrer, setting forth 14 separate grounds for special demurrer. The court sustained the first ground of special demurrer and overruled the general de-





demurrer and all other grounds of special demurrer, and the defendant filed a plea of the general issue to said count. Subsequently, on September 22, 1910, the plaintiffs, by leave of court, filed an additional count, to which amendments were afterwards made. To this count, as amended, the defendant filed a general and special demurrer, which was overruled, and the defendant filed a plea of the general issue and several special pleas, which special pleas were afterwards withdrawn.

In said additional count, as amended, the plaintiffs averred in substance that on January 27, 1909, they owned and operated the store in question, that they owned the stock of goods therein of the value of \$32,000, and the fixtures and furnishings therein of the value of \$6,000, and the leasehold interest in the premises and the good will of the business of the value of \$6,000, all of which facts were well known to the defendant; that on said date the defendant, with intent to cheat and defraud the plaintiffs and to obtain from them a transfer to the defendant of said goods, fixtures, good will and leasehold interest without giving any adequate consideration therefor, and for the purpose of influencing the plaintiffs to transfer said property to the defendant in exchange for certain lands in North Dakota, which defendant then claimed to own, falsely and fraudulently represented to the plaintiffs as follows: That the defendant "then had a title of record in fee simple and that the said title was good" in and to 18 1/2 sections of land in North Dakota; that included in said 18 1/2 sections were 7 sections of land (describing the 7 sections above described); that said lands were "unencumbered"; that defendant then had an abstract of title showing a title of record in him to said lands in fee simple, and that he had a good right to transfer and convey the same; that defendant had personally travelled over said lands

[illegible]

three times and was entirely familiar with their location, character, quality and market value; that said 18 1/2 sections, containing 11,340 acres, were of the average market value of \$12.50 per acre; that defendant, in October, 1907, had purchased said sections from the Northern Blue Grass Co. for cash at the price of \$7.50 per acre, "free and clear of all encumbrance"; that in June, 1908, said Blue Grass Co. had offered defendant \$9.50 per acre for all of said sections, provided defendant would pay \$1.00 an acre commission to said company; that defendant showed to the plaintiff James Taylor (who was then acting for himself and his co-plaintiff) a letter purporting to be, and which he stated was, from said Blue Grass Co., containing said offer of \$9.50 per acre; that defendant also showed James Taylor another letter, purporting to be from the same company, containing an offer of \$100,000 for said 18 1/2 sections; that defendant stated that the 7 sections above described were "the best of the lands in said 18 1/2 sections"; that the 3 sections in Range 23 above mentioned "were gently rolling, fine pasture land, with plenty of good water, and suitable for tillage and cultivation"; that the 4 sections in Range 24 above mentioned "were as level as a table, and were good plow lands"; that said lands were situated within three miles of an established railroad survey made by the Northern Pacific R.R. Co. And plaintiffs further averred that defendant, for the purpose of deceiving plaintiffs and to persuade them that his representations so made were true and reliable, requested of plaintiffs and induced them to give to defendant an option in writing to repurchase said 7 sections at the price of \$10 per acre, and that defendant at that time well knew that said lands were worthless, or nearly so, and had no intention of exercising said option or repurchasing said lands. And plaintiffs further averred that on January 27, 1909, relying upon the said statements and representations of the defend-

[illegible]



ant and believing them to be true, they transferred to the defendant by proper bill of sale, and the defendant became the owner of, said goods, fixtures, good will and leasehold interest, which were then of the market value of \$44,000, and that in exchange therefor the defendant delivered the warranty deed transferring said 7 sections of land to James Taylor, as grantee, for the use and benefit of both plaintiffs, and that as a matter of fact said land was taken at an agreed valuation of \$10.00 per acre. And plaintiffs further averred that all and each of said representations so made by the defendant "were false and fraudulent, and were then and there well known to the defendant to be false and fraudulent", and were made with the intent of deceiving and defrauding plaintiffs and obtaining their said property without paying any adequate, or any, consideration therefor; that each of the plaintiffs were "entirely ignorant of the title to said land and of the character, quality and value of the said sections so deeded"; that said lands were unimproved lands and were "situated hundreds of miles from Chicago, many miles from any settlement, and at the time of said transaction were covered with snow and were so inaccessible that it would have been impracticable and impossible for either of the plaintiffs to have investigated them and ascertained their value"; that the original records, showing the condition of said title, were kept in the county seat of said Dunn county, and that it would have been impracticable for plaintiffs to have investigated said record of title or have ascertained the truth or falsity of said representations; and that plaintiffs, in exchanging their said property for said lands, "relied solely and entirely upon the aforesaid statements and representations" made to them by the defendant. And plaintiff further averred that the defendant on said date did not have a good title or any title of record in said lands; was not the owner of





said lands or any part thereof; did not have an abstract showing good title, or any title of record in him, in fee simple to said 7 sections, and has never delivered to either of the plaintiffs any abstract of title, or conveyed to either of them a good title in fee simple, to said lands or any part thereof; that on said date the defendant well knew that neither he nor the Northern Blue Grass Co. had any good title of record in fee simple to said lands; that said plaintiffs have never obtained from the defendant or from any other person good title, or any title, to said lands or any part thereof; that on said date said lands were not unencumbered, but that there was a mortgage on said 18 1/2 sections exceeding \$17,000; that on said date the average value of said sections did not exceed \$1.50 per acre; that said Northern Blue Grass Co. never did in fact offer defendant \$9.50 per acre for all of said 18 1/2 sections, provided he would pay said company \$1.00 per acre as a commission, and that the letter to that effect shown to James Taylor was not the genuine letter of that company; that the said letter containing the said offer of \$100,000 for said 18 1/2 sections by said company was not a genuine letter; that said 7 sections were not in fact the best of the lands in said 18 1/2 sections, but were the worst lands in said sections; that all of said 7 sections "then were and are exceedingly rough and broken, and wholly unfit for agricultural purposes and for tillage and cultivation", being located in the district commonly known as the "Bad Lands", and being worth not to exceed \$1.50 per acre; that said lands were not then situated within three miles of any established railroad survey, but that the nearest located railroad survey to any part of said lands was and is more than twenty miles distant; and that all of which facts were well known to the defendant on said date of said transfer, and that none of which facts was known to



either of the plaintiffs until May 18, 1909. And plaintiffs further averred that by reason whereof they have been deprived of their said stock of goods, fixtures, good will, and leasehold interest, in all of which they were jointly interested as co-partners, and "have received in exchange therefor no valuable consideration of any kind or nature", and plaintiffs have sustained damages, etc.

The allegations of the original count, filed June 8, 1909, were substantially the same as those in the amended additional count as above set forth, with the exception that in the last paragraph of the original count plaintiffs averred that, in exchange for their said property, they had received "said 7 sections of land \* \* of the value of not to exceed \$6720."

It appears that the trial before the jury was commenced on October 11, 1911. Just prior to this the defendant made the following motions, among others, in writing: (1) "In view of the fact that plaintiffs proceed upon the theory of an affirmance of the contract in question, the defendant moves the court to require the plaintiffs to elect whether they will proceed upon the theory that damages have been suffered by them by reason of false representations respecting value, quality or physical condition of the real estate in question, or whether damages have been suffered by them by reason of false representations respecting the fee simple title", and (2) "The defendant moves the court to require the plaintiffs to elect whether they will proceed in this action upon the theory of having received absolutely nothing of value in the exchange in question, or whether they will proceed herein upon the theory that they did receive something of value in said exchange". Both motions were denied by the court and exceptions taken.





It further appears from the evidence introduced before the jury that, on October 10, 1911, (the day before the jury were impanelled) the title to said 7 sections had wholly failed, and because of the following happenings: After the trade between plaintiffs and defendant had been made, and after plaintiffs had commenced the present action, a receiver of the Northern Blue Grass Co. was appointed, October 9, 1909, by the United States District Court, at Madison, Wisconsin. Thereafter the Big Bend Land Co. intervened in said receivership proceedings and asked leave to foreclose certain land contracts between it and said Blue Grass Co., one of which contracts concerned the 16 1/2 sections deeded by said Blue Grass Co. to the defendant Hamberg as above mentioned. The court refused to permit such foreclosure, but directed that it be ascertained what was the total amount due to the Big Bend Co. from the Blue Grass Co. under the contracts, and allowed various persons, including the defendant Hamberg, who had received warranty deeds from the Blue Grass Co. to intervene in said receivership proceedings. Hamberg, with others, intervened and prayed that the Big Bend Co. should be ordered by the court to execute deeds, conveying to them respectively the several parcels of land covered by their several deeds from the Blue Grass Co., upon the payment by them to the Big Bend Co., or to the receiver of the Blue Grass Co., of the sums which the court might find due from the Blue Grass Co. to the Big Bend Co. From the testimony taken in said receivership proceedings it appeared that Hamberg had in his possession \$12,500, which had been paid to him by the Blue Grass Co. as security for its performing the covenants contained in its warranty deed to him, and as security for its obtaining for him a clear title to said 16 1/2 sections. Thereafter, on September 30, 1911, a decree was entered by the court in said receivership proceedings in which it was adjudged, inter alia, that





over \$98,000 was still due the Big Bend Co. on its said land contracts with the Blue Grass Co.; that over 18,000 acres of land (including said 18 1/2 sections deeded by said Blue Grass Co. to Hamberg as aforesaid) covered by said land contracts, had not yet been conveyed by said Big Bend Co.; that various purchasers (interveners in said proceedings) of lands from the Blue Grass Co. had a right to redeem from the Big Bend Co. the various parcels of land purchased by them as thereafter provided in said decree; that the costs and expenses of said proceedings, amounting to over \$6,000, was declared to be a charge pro rata against each intervener and was to be paid as a condition precedent to any redemption by any intervener; and that the sum due on said land contracts to the Big Bend Co., when apportioned, amounted to \$3.75 per acre on lands contained in Range 93, and \$5.19 per acre on lands contained in Range 94. The decree specifically provided that the intervener, Hamberg, was entitled on or before October 10, 1911, to receive from the Big Bend Co. a warranty deed, and from the receiver of the Blue Grass Co. a receiver's deed, conveying each of said 18 1/2 sections of land, provided he should pay a certain named sum due to said Big Bend Co., as apportioned to the particular section, together with interest at 6 per cent. from August 25, 1911, also a certain named sum for expenses of the litigation as apportioned, also two other certain named sums, together with 6 per cent. interest on the same, respectively from February 28, 1911, and from March 30, 1911, which said two sums had been paid by the Big Bend Co. on account of taxes on the particular section. Said decree further provided that in the event that Hamberg failed to redeem in the manner provided, on or before said October 10, 1911, he, and any and all persons claiming under him, should be forever barred and foreclosed of all right, title, interest or equity of redemption in and to said



lands. A copy of this decree was introduced in evidence in the present case by the plaintiffs, over the objection and exception of the defendant. The objection, however, was not on the ground that the same was a copy, but on the grounds that the same was incompetent, irrelevant and immaterial. It appears from the evidence that neither on October 10, 1911, nor at any time prior thereto, did Hamberg, or any person claiming under him, or any person for Hamberg, or either of the plaintiffs, or any person for them, redeem any of said 18 1/2 sections of land.

The evidence introduced on the trial tended to show that on or prior to January 27, 1909, the defendant made the representations to the plaintiffs, as charged in said additional count, as to the character, quality and value of said lands, and as to the title thereto and as to there being no encumbrances thereon. The defendant, however, denied making such representations. The evidence further tended to show that said representations were false, were known to the defendant to be false at the time when made, and were fraudulently made by him for the purpose of inducing plaintiffs to make the trade or exchange, and that the plaintiffs relied on said <sup>re</sup>presentations and were induced thereby to make said trade or exchange. The evidence further shows that the plaintiffs, in making said trade, transferred to the defendant their stock of goods, fixtures, good will and leasehold interest, all worth a large sum of money, and as shown by subsequent events received absolutely nothing in return. Plaintiffs offered to prove that the fair, cash market value of said stock of goods at the time of said transfer was between \$33,000 and \$34,000, and the value of said fixtures was \$5,000, but was not allowed so to do, upon objection being made by the defendant.





MR. JUSTICE BRIDLEY DELIVERED THE OPINION OF THE COURT.

It is contended by counsel for defendant that, inasmuch as each count of plaintiffs' declaration proceeds on three "theories" for a recovery, ( viz: (1) False representations as to the character, quality and value of the land, (2) false representations as to encumbrances thereon, and (3) false representations as to the existence of title) the court erred in not requiring plaintiffs, upon defendant's motion made at the commencement of the trial, to elect upon which one of these theories they would proceed, and for the reason that these theories are "inconsistent", in that a different rule as to the measure of damages is applied in Illinois where a recovery is sought because of false representations as to the existence of title, from that applied where a recovery is sought because of false representations as to the character, quality and value of the land or as to encumbrances thereon. Even though it be granted, for the sake of the argument, that a different rule obtains in Illinois as to the measure of damages as stated by counsel, we are unable to perceive that there is anything inconsistent or contradictory for a plaintiff, in an action for damages for fraud and deceit in the sale of land, to join in one count allegations that the defendant fraudulently, and for the purpose of inducing the plaintiff to purchase the land, made false representations, upon which plaintiff relied, in all of the three particulars mentioned. But we do not understand that a different rule obtains in Illinois as to the measure of damages for false representations as to the existence of title from that as to false representations as to character, quality and value and as to encumbrances. The principle underlying the decisions of the appellate courts of this state seemingly is, that the plaintiff is entitled to the benefit of his bargain and that the defendant

...the ... ..



is not entitled to profit by his fraud. (Drew v. Beall, 82 Ill. 184, 188; Antle v. Sexton, 137 Ill. 410, 413.) It is the law of this state that in an action on the case for false and fraudulent representations in the sale of land, where the representations are as to the character, quality and value of the land, the measure of damages is the difference between the actual value of the land and what it would be worth if the representations had been true, together with lawful interest on such difference. And where the false and fraudulent representation is that there is no encumbrance on the land, when in fact there is an encumbrance, the measure of damages is "the amount of the encumbrance, if less than the value of the land". (Mahl v. Brooks, 213 Ill. 184, 187.) Counsel for defendant contend, however, that where the false and fraudulent representation is regarding the existence of title, which title totally fails, the measure of damages is the price paid by the purchaser of the land or the value of the consideration given by him therefor. While this may be the rule in some jurisdictions, it is apparently not the rule in this state. (Drew v. Beall, *supra*; Antle v. Sexton, *supra*; Schwitters v. Springer, 238 Ill. 271, 274; Haldeman v. Schuh, 109 Ill. App. 289, 285.) And we are unable to perceive why, in principle, a different rule as to damages should be applied where the representations complained of were concerning the existence of title. In Drew v. Beall, *supra*, it appeared that Beall was induced by false and fraudulent representations of Drew, as to the condition, quality and value of certain Missouri land belonging to Drew, to give in exchange therefor a house and lot and \$800 in money, and deeds were made by the parties, each to the other. Beall sued Drew for damages for fraud and deceit. It was contended by Drew that if the evidence showed that Beall had been fraudulently deceived as to the land, his damages would be the value of his house



and lot, less the \$800 and less the actual value of the Misconri land, and that this would restore Beall to the condition he was in before the bargain was made, and be all he was entitled to receive as damages. But the court held to the contrary, saying (p.108): "The parties had, by their agreement, fixed an estimate and value upon the property which each sold and transferred to the other, and it was not for the jury to make a new contract for them, or fix a new price upon plaintiff's property for them. The plaintiff was entitled to the benefit of his bargain. The defendant had received the consideration agreed to be paid by the plaintiff, and the latter was entitled to have such a tract of land as this was represented to be, and if he has not got it, his damages, by reason of not getting it; and the proper measure of damages, we think, is the difference between the actual value of the land, and the value of such a piece of land as this was represented to be by the defendant." In Antle v. Sexton, supra, the rule of damages as enunciated in Drew v. Beall was held to apply where the fraudulent representations were regarding the quantity of the property as distinguished from the quality thereof. In Haldeman v. Schuh, supra, Schuh brought an action for damages against Haldeman for fraud and deceit arising out of the exchange of certain lands. Schuh owned a farm in Iowa. Haldeman claimed to own 1000 acres of land in Tennessee. A contract was entered into by the terms of which Schuh was to give Haldeman a certain amount of cash, personal property and the Iowa land, in exchange for the Tennessee land. The evidence showed that Haldeman represented that the title to the Tennessee land was perfect, and that the land was situated within one and a half miles from the county seat of Cumberland county, and that it was covered with valuable timber and underlaid with coal. The evidence also showed that the land was in fact situated 18 miles from said county seat,





that it had no timber upon it and that the title "was seriously defective if not worthless". On the trial the validity of the title to the Tennessee land was a material issue, and it seems that proof was offered by both parties on the theory that the measure of Schuh's damages was the value of the consideration given by him to Haldeman. The appellate court held that the correct measure of damages was as stated in Drew v. Reall, supra. We are therefore of the opinion that the trial court in the present case did not err in denying defendant's motion that plaintiffs be required to make the election mentioned.

And we are of the opinion that the allegations of the additional count and the evidence introduced in support thereof were sufficient, under the law of this state, to support the verdict and judgment, as regards the representations of the defendant concerning the character, quality and value of the land, (Piewer v. Mueller, 254 Ill. 315, 333; Borders v. Kettleman, 142 Ill. 96, 103; Douglass v. Treat, 246 Ill. 593, 602; Willer v. John, 111 Ill. App. 56, 206 Ill. 175; Linington v. Strong, 107 Ill. 295, 302) and as regards the <sup>re-</sup>presentations concerning the existence, validity and character of the title, (Wicks v. Deemer, 137 Ill. 164, 170; Smith v. Hoffman, 120 Ill. App. 198, 201) and as regards the representations concerning encumbrances on the land. (Mehl v. Abram, 210 Ill. 218, 234; Bahl v. Brooks, 213 Ill. 134, 138).

And we do not think that the trial court erred in admitting in evidence the copy of the decree of the United States court. This decree, and the further evidence that no redemption of the lands had been made in accordance with its terms, were competent at least to show a total failure of title to said lands.

Nor do we think that the admission of certain testimony offered by the plaintiffs, tending to impeach the defendant and





the defendant's witness, Mummell, constitutes such error as, under all the facts and circumstances of this case, justifies a reversal of the judgment, as contended by counsel.

It is strenuously urged that the giving of instruction No. 24, offered by the plaintiffs, was such an error as requires a reversal of the judgment. By this instruction the jury were told that if they believed from the evidence that the defendant represented that he had been over and inspected and personally knew the character and quality of the land, and "made various representations with regard to the quality and character of the said land" and that said representations "were in fact false, and that defendant intended to deceive the plaintiffs thereby, and that the defendant knew they were false, or that, without knowing, he made such representations in reckless disregard of their truth or falsity, then the defendant is liable to the plaintiff, whether said representations were made from a personal inspection of the said land, or whether made with a knowledge on the part of the defendant that he had not been over or inspected the said land and was therefore ignorant of the quality of the same". Counsel say that this instruction directs a verdict and does not include certain elements necessary to a recovery, viz: that the representations must have been as to material facts and that plaintiffs must have relied upon the representations. After careful consideration we have reached the conclusion that, while this instruction is subject to criticism, we do not think that the jury were misled by it, when all the facts in evidence and the many other instructions given are considered, or that the giving of it was such error as justifies a reversal of the judgment. The instruction was one of a series, and there is considerable force in the argument of counsel for plaintiffs that the instruction should not be regarded as a "directed verdict" instruction, but rather as one which told

1. The first two sentences, "I have a dream" and "I believe", are the most important in the speech. They set the tone and the purpose of the speech. The speaker is not just talking about a dream, but about a dream that he believes in. This is a powerful statement that shows his conviction and his faith in the future of his country.

the jury that, if they believed that the defendant had represented that he had personally inspected the land and had knowledge of its quality and character, and had made false representations regarding its quality and character with intent to deceive plaintiffs, the defendant was equally liable whether the representations were made after a personal inspection, or made without any inspection and with a reckless disregard of the truth or falsity of said representations. Furthermore, while the element that the plaintiffs relied upon said representations is not mentioned in this instruction, the jury were fully instructed on this point by other given instructions offered by the defendant, and, in our opinion, the giving of it was not prejudicial error for the reason that there was no real dispute of the fact that plaintiffs did rely upon said representations. (Gerke v. Paucher, 156 Ill. 375, 325; Illinois Central R. Co. v. King, 179 Ill. 91, 96; Johnston v. Hirschberg, 185 Ill. 445, 447; Village of Mansfield v. Moore, 194 Ill. 133, 134; St. Louis, etc., R. Co. v. Holman, 185 Ill. 31; Chicago City R. Co. v. Carroll, 206 Ill. 318, 331; McCommon v. McCommon, 161 Ill. 428, 440; Chicago R. I. R. Co. v. Crose, 214 Ill. 302, 314; Illinois Central R. Co. v. Cozby, 174 Ill. 109, 118.)

Complaint is also made of the giving of instruction No. 34, offered by plaintiffs, which was concerning the measure of plaintiffs' damages. We have carefully considered this instruction and are of the opinion that the giving of the same was not prejudicial to the defendant.

We have considered the many other points urged as grounds for reversal and believe them to be without merit. In fine, after a painstaking examination of the voluminous abstract of record and of the exhaustive briefs and arguments of respective counsel, we think that the verdict was in accord with substantial justice, and the judgment will, accordingly, be affirmed.

AFFIRMED.





400 - 18446.

ARTHUR B. WRIGHT,  
Appellee,

vs.

JOHN P. WILSON, NATHAN G.  
MOORE and WILLIAM B. McILVAINE,  
as co-partners, engaged in the  
practice of law under the firm  
name of WILSON, MOORE & McILVAINE,  
Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

183 I.A. 255

STATEMENT OF THE CASE. This is an appeal from a judgment of \$2500, rendered in the Municipal court of Chicago, January 13, 1912, against appellants, defendants below, and in favor of appellee, plaintiff below. The action was one of the first class and was tried before a jury who returned a verdict finding the issues against the defendants and assessing plaintiff's damages at the sum of \$2800. Plaintiff and defendants were associated together as counsel for complainants in a certain protracted chancery litigation and plaintiff claimed that the defendants received the sum of \$5000 as solicitors' fees, which sum had been ordered paid by the chancery court to plaintiff and defendants as such counsel, \$2500 of which belonged to plaintiff, and which latter sum the defendants refused to pay plaintiff upon demand. The defendants denied that they were indebted to plaintiff in any sum whatever.

In plaintiff's amended statement of claim, filed November 15, 1911, it was alleged that plaintiff, a duly licensed attorney at law, had been retained by and acted as counsel for the complainants in a certain suit in the Circuit court of Cook county, General No. 279224, entitled Alice Clark, et al. v: Edwin F. Bayley, et al.; that the defendants herein were associated with him as counsel for said complainants, and that on November 13, 1908, said Circuit court entered in said suit a

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certain decree or order, all of which allegations were admitted by the defendants. This decree was set out in full in plaintiff's statement of claim, and plaintiff therein alleged that the decree was in favor of the plaintiff and the defendants herein for the sum of \$5000, and that by virtue of the decree "the plaintiff herein and the defendants herein became and were entitled to the sum of \$5000, to-wit, the plaintiff the sum of \$2500 and the defendants the sum of \$2500". From this decree it appears, among other things, that the court by another decree, entered on July 29, 1908 (in the consolidated causes, viz: No. 279234, above mentioned, and No. 240815, entitled Eunice M. Smith, et al. v. Caroline Patterson, et al.), had directed Thomas Taylor, Jr., a master in chancery of said court, to carry into effect the said decree of July 29, 1908, and to apply to the court from time to time for further directions if it should be found necessary, that said master has applied for further directions and has made a report of his findings and recommendations, and that the court, after considering said application and report of the master and the arguments of the several counsel of all parties in interest, finds that certain conclusions must be stated by the court before the master can carry into effect the said decree of July 29, 1908. Said decree (that of November 18, 1908) then sets forth the court's findings and conclusions in separate paragraphs or sections, numbered from 1 to 8 inclusive. Paragraph 3 is as follows (italics ours):

"3. The allowance of counsel fees in this proceeding was expressly reserved by said decree to be determined by this court; wherefore the said Master has made no report on said matter, but asks that the same be determined, so that the deficiency of funds available to carry out said decree may be more definitely known. Accordingly the court, having heard the representations of counsel upon the question of solicitors' fees, and upon application of the several parties for allowances for solicitors' fees to be paid out of the trust fund, doth order, adjudge and decree as follows:

Counsel for Edwin F. Bayley, one of the Trustees under the will of Jonathan Clark, is entitled to solicitors'



fees for services rendered in this cause, which the court finds and adjudges to be reasonably worth the sum of \$10,000, the same to be paid from funds in the hands of said executors; and counsel for complainants, Alice Clark and others, are justly entitled to have an allowance for counsel fees, to be paid out of said trust fund, by the executors and trustees under the will of Jonathan Clark, and the court finds and adjudges that \$5000 will be a reasonable sum to be so paid, the court finding that the services of complainants' counsel were for the benefit of the fund and of all parties in interest."

Paragraph 4 of said decree sets forth, in substance, that the Master has reported that the executors of the will of Jonathan Clark, and the trustees under said will, have not in their hands sufficient sums to pay the amounts required to be paid by them under the former decree, viz: certain accrued annuities to October 30, 1908, and other payments, that the executors have available the total sum of \$156,461.61, and that there remains a deficiency of about \$58,585.39, all of which remains due to said surviving children of Jonathan Clark and those entitled under Eunice O. Smith. Paragraph 5 of said decree approves the recommendations of the Master in respect to the mode of dealing with the said deficiency, and orders, inter alia, that the executors pay out of said net sum of \$156,461.61, "available funds in their hands in carrying out said decree under the Master's directions", various enumerated sums of money to certain parties, including the amount directed to be paid as accrued annuities to the grandchildren of Jonathan Clark to and including October 30, 1908, "also the sums allowed by the court as counsel fees in this court, i.e. \$15,000", and further orders, inter alia, that, when said sums so directed to be paid to said certain parties, to said grandchildren of Jonathan Clark, and "to counsel as allowed above", have been fully paid, or the whole amount of money so in hand applied thereto, and the amount of the deficiency of funds precisely ascertained, the entire remainder of the sums, directed by said decree and herein to be paid, shall be and is hereby charged

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upon the entire fund, which is now in and shall come to the hands of the trustees under the will of Jonathan Clark, as indebtedness of the said trust estate. In paragraph 8 of said decree the court finds, inter alia, that the counsel for certain charitable corporations have rendered valuable services to the court, for which they are entitled to be paid the sum of \$2500 out of the trust funds in the hands of said trustees, and orders that said sum be paid to certain solicitors (naming them) by said trustees out of the funds coming to their hands in due course of administration.

It was further alleged in plaintiff's said statement of claim that on or about November 16, 1908, the defendants, Wilson, Moore and McIlvaine, applied to and collected from George T. Clark and Edwin F. Bayley, executors of the will of said Jonathan Clark, deceased, the said sum of \$5000, so ordered to be paid to the plaintiff and the defendants herein as counsel in said suit, No. 279224, pending in said Circuit court; that said defendants collected said sum without the knowledge or consent of plaintiff, and that Nathan G. Moore, one of the defendants and a member of said law firm of Wilson, Moore & McIlvaine, executed without plaintiff's knowledge or consent a certain receipt, as follows:

"Chicago, Illinois, 1908

Received of George T. Clark and Edwin F. Bayley, Executors of the will of Jonathan Clark, deceased, the sum of five thousand (5000) dollars in full payment of the amount due to the undersigned as complainants' solicitors under the supplementary decree entered on November 16, 1908, in the case of Alice Clark, et al., vs. Edwin F. Bayley, et al., No. 279,224 in the circuit court of Cook county, Illinois.

Wilson, Moore & McIlvaine  
Arthur B. Wright."

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It was further alleged in said statement of claim that said defendant Moore, without the knowledge or consent of plaintiff, subscribed the name of plaintiff to said receipt in order





to obtain the \$2500 due to plaintiff under said decree, said \$2500 being a part of said \$5000; that plaintiff ascertained on or about December 11, 1908, that the defendants had collected said \$5000, and immediately called at the office of defendants and demanded of them through Nathan G. Moore, the payment of said \$2500; that numerous demands have since been made by plaintiff upon defendants to pay to him the said \$2500, but that said defendants have not paid to plaintiff the same or any part thereof. Accompanying plaintiff's said statement of claim was an affidavit of plaintiff to the effect that the suit was upon contract for the payment of money, that the nature of plaintiff's demand was as set forth in the statement of claim and that there was due plaintiff from the defendants, after allowing them all just credits, etc., the sum of \$2884.68.

To this amended statement of claim and affidavit of the plaintiff the defendants, on November 18, 1911, filed an affidavit of merits, setting forth the nature of their defense. The affidavit was made by the defendant Moore on behalf of himself and his co-defendants. It was of several pages in length. It concluded as follows:

"Accordingly, the defendants set up, as a defense to this claim, the lack of right, title or interest of the said Wright in or to any part of the said sum of \$5,000. Further, that said decree for \$5,000 was entered at the instance and request, and upon the application of the parties to said chancery suit and not at the instance of the solicitors, and that the decree in effect made an allowance to complainants in said cause, and that the money had, by the arrangement aforesaid, been applied to and for the benefit of the complainants in said cause before this action was begun, and that this was well known to plaintiff herein, and, therefore, that at the said time these defendants had in their hands no money whatever received from said decree but had, by the proceeding aforesaid, turned the same over, and paid the same to and for the complainants in said cause, with their knowledge and concurrence, and at their request."

On the trial plaintiff was the only witness in his behalf, and Nathan G. Moore and Frederick W. Clark were the only witnesses



on behalf of defendants. Various papers or documents were, however, offered and received in evidence. In addition to introducing a certified copy of said decree of November 18, 1908, above mentioned, plaintiff introduced a decree of said Circuit court, supplemental to said decree of November 18th, dated December 5, 1908, and the original "Master's Report of Distribution", dated December 31, 1908, filed January 23, 1909. The said supplemental decree of December 5, 1908, recites that the cause came on to be heard upon the Master's report praying for instructions whether to now deliver certain deeds and other instruments, mentioned in said report, pursuant to the decree of July 29, 1908, and the said supplemental decree of November 18, 1908; that the court finds from the Master's report that, for the purpose of completely executing the said decree the Master has received and has in his possession for delivery, if approved by the court, certain deeds and instruments (naming them); that the court further finds that "said executors, \* \* out of the balance in their hands, have paid the several amounts allowed and ordered to be paid by said supplemental decree for solicitors' fees", and that "all of the said instruments, \* \* acknowledgements and certificates \* \* are now, together with said Master's report, submitted to the court for its \* \* approval; that all of said instruments, in respect to form and substance are, and have been duly executed, in accordance with said decrees; that the court orders and decrees that the several suits and proceedings pending in the several courts of Cook county, mentioned in said decree, be forthwith dismissed, and that upon full compliance with the provisions hereof the said Master report the same to this court for Final Confirmation. In said "Master's Report of Distribution", which recited that the same was made pursuant to the decree of December 5th, the Master reported, inter alia, that all





the provisions of said decree had been fully complied with, that all payments provided for by the decrees of July 28th and November 16th, had been made and proper receipts therefor executed and delivered, and that attached to the report were various receipts, among which was the "receipt from Wilson, Moore & McIlvaine and Arthur B. Wright, for \$5,000". This original receipt so attached to the Master's report was introduced in evidence by plaintiff, and is in the words and figures as above set forth in plaintiff's statement of claim.

It appears from the evidence that early in the year 1903 plaintiff was employed by representatives of the widow and heirs of Jonathan Clark, deceased, in the matter of the contest of the will of said deceased, and that on June 17, 1903, a written contract was entered into between plaintiff and said representatives. This contract was introduced in evidence by the defendants, and provided that the compensation for professional services to be performed by plaintiff should be \$250 per month, together with \$75 per month for Mr. Cox and \$50 per month for typewriting - a total of \$375 per month; that the agreement should date from May 1, 1903, and that the sum of \$1000 then paid to plaintiff was for services performed prior to such date; that "the foregoing monthly payments are in full of all demands for any services rendered by said Wright to the heirs of Jonathan Clark, except in the event of a settlement made with the approval of all concerned, or except in the event of a successful issue, whereby the will of Jonathan Clark is permanently set aside, in either of which events the compensation shall be such additional sum as Mr. Wren Smith, Mr. George Clark and Mr. Fred Clark, or any two of them, shall agree upon". About this time the law firm of Wilson, Moore & McIlvaine were employed in the same interest. A bill in chancery to set

and the fact that the same person had been in the same place at the same time as the person who was arrested, the court found that the evidence was sufficient to establish that the person who was arrested was the same person who was in the same place at the same time as the person who was arrested.

[illegible]



aside said will was prepared by plaintiff and Mr. Cox, which was submitted to the defendant Moore, before it was filed, and certain modifications were made by him. Three bills were filed, one to set aside said will, and two in the name of George F. Clark, executor, to set aside certain transfers said to have been made by said Jonathan Clark to one Caroline Patterson. Ultimately, after considerable litigation, a plan for a settlement was agreed upon. A bill in equity to confirm this settlement was prepared by the defendant, Moore, and filed, but this bill was subsequently dismissed, and a new bill was drafted, in which all the parties in interest were brought into the case, and the case was consolidated with the one brought to set aside said will, and ultimately the decree of July 29, 1908, adjudging the rights of all parties, was entered in conformity with the terms of settlement agreed upon. During all this time plaintiff had been receiving the monthly compensation mentioned in said agreement of June 17, 1903, except the \$80 therein mentioned for typewriting. He testified that up to June, 1904, the full amount of \$375 per month was paid him and that after that date and up to and including the month of September, 1906, he received \$325 per month, and also received in addition such items of expenses incurred as he had rendered bills for. Mr. Shea Smith, a son-in-law of said Jonathan Clark and one <sup>of</sup> the three persons mentioned in said agreement of June 17, 1903, to determine what additional sum should be paid plaintiff in the event of a settlement of the litigation, or in the event of a successful issue thereof, died early in the year 1907. Plaintiff testified that the other two persons, mentioned in said agreement of June 17, 1903, George Clark and Fred Clark, did not to his knowledge come to any agreement at any time subsequent to July 29, 1908, awarding plaintiff additional compensation; that they never arbitrated it.

[illegible]

Frederick W. Clark, designated as Fred Clark in said agreement of June 17, 1903, testified that subsequent to the entry of the decree of December 5, 1903, he and his brother George Clark had a meeting with plaintiff regarding plaintiff's fees; that on March 22, 1909, he and his brother George again met regarding the same matter, at which meeting plaintiff was not present; that at this meeting a document or letter was drawn up, dictated by the defendant Moore and signed by George Clark, which document was transmitted to plaintiff. It further appears from the testimony that subsequent to this time, plaintiff commenced a suit in equity against the heirs of Jonathan Clark (which suit is pending) to recover the additional compensation or contingent fee claimed by him, that said Moore in the first instance appeared as counsel representing the Clarks in said suit, but subsequently withdrew his appearance for the reason that he would probably have to be a witness.

Plaintiff testified that about a month before the decree of November 18, 1903 was entered he had a conversation with the defendant Moore as to solicitors' fees to be allowed plaintiff and defendants; that plaintiff stated to Moore that he thought that "the fund should pay solicitors' fees", that while Mr. Bayley was a trustee of the fund he (plaintiff) had done more to preserve the fund than anybody else, that he did not think that anyone would object to fees being paid for preserving the fund, and that he proposed to Moore that plaintiff and defendants should make an application for solicitors' fees and that those fees, if allowed, be divided equally between plaintiff and defendants; and that Moore replied: "That is all right; we can try it; I don't know whether we can get them or not; if we can, it is all right". Plaintiff further testified that it was his understanding that the allowance of fees "was not for services rendered to my clients;





that money was paid or to be paid from the fund; it was for services rendered to the fund, and there were a lot of people interested in that fund besides my clients". The defendant Moore, however, testified that "Mr. Wright never said to me that he thought he was entitled to a fee out of the other parties to the suit to be allowed to him as a solicitor's fee. There never was any suggestion as to the allowance of fees to anybody but on behalf of the complainants in the case", and that there was never anything said between Moore and plaintiff as to defendants taking half of what was to be allowed and plaintiff taking the other half. Mr. Moore further testified:

"In the summer of 1908 the question arose about solicitors' fees. Counsel for the Jonathan Clark estate, Mr. Bayley, Mr. Webster, Mr. Morace Tenney, were asking or proposed to ask, to have their fees paid out of the trust fund instead of by their own clients direct, and we had a long discussion about that. I stated that the fees for Mrs. Alice Clark and complainants were for the benefit of the general fund, a good deal of it, and there ought to be that allowance made. They refused at first to do that, and we had a long discussion before there was any arrangement reached. No arrangement was reached until within two or three days before the order of November 18th was entered. At that time it was arranged that they should have an allowance of \$10,000 to be paid out of the fund, and that Alice Clark and the complainants should have an allowance of half of that amount. \* \* \* I told Mr. Wright what my conclusion about the law was and the reason why there was a difficulty in getting an allowance out of the case. I said that, as I understood it, the only case in which a claimant could recover counsel fees out of the general fund, was where he was getting a share himself, as a party to the same litigation, and was suing for the benefit of the fund, and that the court frequently allowed that as a re-imbursement for expenses, and that whether we could show that our action was for the benefit of the fund depended upon circumstances; that to me it was a little bit doubtful whether it came within that rule; if it did we could get them, if it did not we couldn't. Accordingly, I said to him it depended very much on negotiations, that I thought we were in a position to prevent the other side from getting it, and if they wanted it very badly they might agree to our having it, and that was the way it turned out. I conducted those negotiations."

Mr. Frederick W. Clark testified:

"I first heard about the projected effort to have an allowance made in this case, on account of complainant's solicitors, at the time the allowance was claimed by Mr.

no record of foreign intelligence and defense personnel work in  
the United States or abroad, and no record of any other activities  
of the United States or abroad, and no record of any other activities



Bayley for services for Mr. Webster, and for Mr. Cox and others. I stated in Mr. Wright's presence that there was no more reason why Webster and Bayley should be allowed counsel fees than Mr. Moore should be allowed counsel fees, and he agreed with me that if counsel fees should be allowed to one that counsel fees should be allowed to the other. My statement was that the allowance was to be made to Mr. Moore, and Mr. Wright coincided and fully approved that they were to be made to Mr. Moore. \* \* I think I said the money should be allowed the widow on account of her expenses, and should be applied on Mr. Moore's bill against the heirs, and Mr. Wright said that was a perfectly proper thing."

The defendant Moore further testified that he prepared the notice on which the decree granting the allowance of fees was entered. This notice was introduced in evidence. It was signed by Wilson, Moore & McIlvaine, as counsel for the complainants in that litigation. It notified the solicitors of the various parties that the court would be asked to enter a decree disposing of all matters mentioned in the Master's report and application for further directions, "including the allowance of counsel fees to the parties in interest, claiming or moving for the same".

As to what happened after the entry of the decree of November 16, 1908, the plaintiff testified on direct examination:

"I first learned that the \$5000, mentioned in paragraph 3 of said decree, had been paid when I saw the voucher which was signed Wilson, Moore & McIlvaine and Arthur B. Wright. I learned that on December 8, 1908. \* \* I had a conversation with Mr. Moore on December 11, 1908. It was the merest formal conversation in which I said that he had drawn that \$5000, and I would be obliged if he would send me a check for half of it and he said that he would do so. He afterwards refused to pay me. \* \* The signature of Arthur B. Wright was not placed upon that receipt by anybody in my behalf or under my instructions."

On cross-examination he testified:

"I don't know that the check for \$5000 was paid over to Mr. Moore in the Master's office. I have a recollection that there was a meeting of counsel, within a few days after the entry of this decree, at the Master's office. I very likely was there. I always was. At that meeting the check was not paid over to Mr. Moore in my presence. It may have been shuffled over to Mr. Moore one way or the other, but I didn't know anything about it. \* \* After the decree of November 16th, the things ordered to be done by the decree in the way of business, etc., were the subject matter of the meeting at the Master's office. \* \*



I did not understand that the money would pass until the court approved of it, and the court did not approve of it until December 5th. \* \* In my conversation with Mr. Moore on December 11th, he did not tell me that he had, before the date of this conversation, already billed his clients and given them credit for that \$5000 for his services. He told me that he would send me a check for \$2500."

Both the defendant Moore and the witness Clark testified that the \$5000 was paid by check payable to the order of Moore; that this check was delivered to Moore by the Master in the Master's office on November 23rd, 1908; that there were a group of people there at the time; that Moore signed both signatures on the receipt; and that plaintiff was present when the check was delivered and the receipt signed. The defendant Moore testified that upon receipt of said check he deposited it in the bank and credited it to said clients of defendants on account of services rendered by defendants in said litigation; that defendants' total charge against said clients was \$35,000, and that on December 10, 1908, (viz: one day before his conversation of December 11th with plaintiff) Moore sent a bill to said clients, in the name of the defendants, for the total sum of \$35,056.15 (the \$56.15 representing certain cash disbursements), in which bill said clients were credited with said \$5000, and with the amount of certain prior payments aggregating \$8500, showing a balance due defendants of \$21,556.15. This bill was introduced in evidence and bore the endorsement of defendants, "Paid, Mar. 3, 1909". The defendant Moore further testified that neither at the conversation had with plaintiff on December 11th, nor at any other time, did he tell plaintiff in words or substance that he would send a check to plaintiff for \$2500 of said \$5000; that on November 25th - the second day after he received the check for \$5000 - he had a conversation at his office with plaintiff; that plaintiff said that he had been expecting to receive a check for half of the

The first part of the book is devoted to a general survey of the history of the world, from the beginning of time to the present day. The author discusses the various stages of human development, from the earliest forms of life to the modern era. He also touches upon the different civilizations that have flourished throughout history, and the impact they have had on the world as we know it today.

In the second part, the author delves into the specifics of the modern world. He examines the various social, economic, and political systems that have emerged in the last few centuries. He discusses the challenges that the world is currently facing, such as environmental degradation, global warming, and the threat of nuclear war. He also offers his own perspective on the future of the world, and the steps that need to be taken to ensure a better future for all.

The book is written in a clear and concise style, and is accessible to a wide range of readers. It is a valuable resource for anyone interested in the history of the world, and the challenges that we face today. The author's insights and perspectives are thought-provoking, and his writing is both informative and engaging.



fee; that Moore told plaintiff that he was much surprised at the request, that plaintiff was working under a contract under which plaintiff was being paid by the month, that the money belonged to the clients, that he (Moore) could not think of turning over any part of it to plaintiff, and that he (Moore) had already credited it to clients and had notified them that it had been done.

At the close of plaintiff's evidence the defendants moved the court to instruct the jury to find the issues for the defendants, which motion was renewed at the close of all the evidence. Both motions were denied by the court and error is assigned thereon.

At the close of all the evidence, the court called aside the respective attorneys and the following colloquy took place:

"THE COURT: I intend to submit two interrogatories to the jury. They are as follows:

Interrogatory 1. Did the defendant Moore agree with the plaintiff Wright to divide the \$5000 involved into equal parts?

Interrogatory 2. Did the defendant Moore, after the payment to him of the \$5000 in question, agree with and promise to send to the plaintiff one-half thereof or the sum of \$2500?

THE COURT: Have either of you gentlemen any objection to their submission?

MR. SCOTT: I have no objection, but I consider these interrogatories immaterial.

MR. McNAB: I have no objection."

After the arguments of the attorneys to the jury the Court instructed the jury orally. A portion of the instructions was as follows, (italics ours):

"You are further instructed that it appears from the undisputed evidence in this case that in the cause of Clark et al. vs. Mayley et al., Circuit Court, General Number 279224, a decree was entered on November 18, 1908, providing among other things that there should be paid to the solicitors for the complainants the sum of five thousand dollars to be paid out of the trust fund by the executors under the will of Jonathan Clark, deceased, for services rendered in said cause by the solicitors for the complainants, which services were for the benefit of the fund and all parties in interest. And it further appears from the undisputed evidence that the defendants, Wilson, Moore & McIlvaine, and





plaintiff, Arthur B. Wright, were at all times during this litigation over the will of Jonathan Clark, solicitors for the complainants. You are further instructed that the allowance of solicitors' fees to solicitors for complainants, as stated in this decree of November 18, 1908, was not an allowance to complainants or to any of them, but was an allowance direct to these solicitors for services rendered to the fund and to all parties in interest."

The transcript of the record shows that the attorney for defendants objected and excepted to the italicized portions of the instructions on the ground that said decree in effect allowed said sum to the complainants themselves. The giving of these instructions is assigned as error.

The jury returned a verdict finding the issues against the defendants and assessing plaintiff's damages at \$2500, and answered both of said special interrogatories, propounded by the court, in the affirmative.

The defendants filed a written motion for a new trial, and also a written motion to set aside the two special findings of the jury based on said interrogatories given by the court. Both motions were denied and judgment was entered against defendants for \$2500. The motion to set aside the two special findings was accompanied with a "stipulation and consent", signed by the defendants, in which it was stated that the defendants did not desire to enter into any dispute with the plaintiff as to the proportions in which plaintiff and defendants should share, if at all, in said sum of \$5000, and that they would

"Consent and agree that, in disposing of this cause in this court and in any court of appeal, it may be assumed that, if the said fund of Five Thousand Dollars (\$5000) \* \* was the property of counsel for complainants in said chancery cause and not the property of complainants themselves, plaintiff herein was entitled to one-half thereof, and such court may enter judgment accordingly, and defendants will not dispute the propriety or legality of such division thereof."



MR. JUSTICE GRIBBLEY DELIVERED THE OPINION OF THE COURT.

Counsel for the defendants do not argue in their brief that the verdict should be set aside as being against the weight of the evidence. They urge that the fundamental question, upon the solution of which the issue in this case depends, is, whether the award of \$5000 was in effect an award to the complainants in said chancery cause or an award to their solicitors; and, treating said award as a valid decree and not void, they contend that said award was in effect an award to the complainants because, on reason and under the authorities, it was not in the power of said chancery court to make any allowance out of the fund, which was the subject of the litigation, except to the parties as reimbursement for expenses incurred which inured to the benefit of all parties in interest, and hence, as plaintiff's action is grounded on the hypothesis that the \$5000 belonged to the solicitors, plaintiff cannot recover of the defendants the portion of said sum of \$5000 claimed by him, or any part thereof.

The portion claimed by plaintiff is one-half, or \$2500. And defendants, by their "stipulation and consent", above mentioned, agree to this if the said sum of \$5000 so awarded was the property of plaintiff and defendants, as counsel for the complainants in said chancery cause, and was not the property of said complainants themselves.

By the express terms of paragraph 3 of said decree of November 18, 1908, the said chancery court, "having heard the representations of counsel upon the question of solicitors' fees, and upon application of the several parties for allowances for solicitors' fees to be paid out of the trust fund", adjudged that the "counsel for <sup>COM-</sup>plainants" were entitled to have an allowance for "counsel fees", and were entitled to be paid the sum of \$5000 out of said trust fund, the court finding that the services of said

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counsel were "for the benefit of the fund and of all parties in interest". By the express terms of said paragraph 3 of said decree, also, the court adjudged that "counsel for Edwin F. Bayley, one of the Trustees", was entitled to "solicitor's fees" for services rendered in the cause in the sum of \$10,000. In paragraph 5 of the decree the court ordered that the executors pay to various parties certain enumerated sums of money, including the "sums allowed by the court as counsel fees in this court, i.e. \$15,000", and in paragraph 8 of the decree the court ordered that certain named solicitors, who as counsel for certain charitable corporations had rendered valuable services to the court, be paid the sum of \$2500. Because of the language of the decree we think it clear that the chancery court intended to order, and did order, that the several allowances for solicitors' fees and for counsel fees be paid to the solicitors as distinguished from the parties. We think it also clear that said court ordered that the allowance in question of \$5000 be paid to the plaintiff and defendants, as counsel or solicitors for the complainants. The trial court in the present case so instructed the jury, and further instructed them that said allowance was not an allowance to the complainants in that litigation but was an allowance direct to the defendants and to the plaintiff, as solicitors, for services rendered to the fund and to all parties in interest. If counsel for defendants are correct in their contention that said award was in effect an award to said complainants, then the jury were erroneously instructed.

To the contention of counsel for defendants, counsel for plaintiff reply, in substance, (1) that in some cases an allowance for solicitors' fees may be made directly to the solicitors and that under the facts of this case the allowance here in question was properly made directly to the plaintiff and defendants herein, and (2) that the contention of counsel for defendants amounts to a

[illegible]



collateral attack upon the decree of said chancery court; that said chancery court had the power to make, as it did, the said allowance directly to the solicitors, and that said decree, even if erroneous, is binding upon the parties to said litigation and all others whose interests are affected thereby (the said decree not having been reversed upon direct proceedings had for that purpose), and that such a construction of the decree, as claimed by counsel for defendants, cannot be invoked, in this collateral proceeding, to contradict the plain language and overwhelm the plain intent of the decree.

Counsel for defendants, in support of their contention above mentioned, argue in their brief that "allowances of the character of that made by the court in its decree are granted in accordance with a principle, which precludes any right on the part of solicitors to claim, or power in the court to make, any such award in their favor"; that "that principle is that where one of several parties interested in a common fund has incurred expenses in carrying on legal proceedings, which have benefitted the fund, and consequently all the parties, he is equitably entitled to be reimbursed for his reasonable expenses out of the fund"; and that "that principle affords no basis for an allowance to the solicitors of such a party". In support of the argument counsel cite the cases, among others, of Trustees v. Greenough, 105 U. S. 527, 532; Mohr-Weil Lumber Co. v. Russell, 34 O.R. Rep. (Ga.) 1005, 1008; Helm v. Smith-Fee Co., 79 Minn. 297, 298; Morgan v. Fidelity & Deposit Co., 38 S. E. Rep. (Ga.) 857. Counsel for plaintiff do not question the "principle", as above stated, but contend that the same does afford a basis for the allowance being made by the court in some cases direct to the solicitors, and cite in support of their contention the cases of Central R. & D. Co. v. Pettus, 115 U. S. 118, 124; Weigard v. Alliance



Supply Co., 44 N. Va. 133, 161; Rogers v. O'Mary, 90 Tenn. 314, 319; Heddaugh v. Wilson, 151 U. S. 333, 338; Adams v. Behlor Co., 30 Fed. Rep. 381; Ex Parte Platt, 2 Wall. Jr., 153, 479. In the Pettus case, supra, certain solicitors filed their petition in a suit in which they had rendered services at the instance of certain complainants representing a class of creditors, as the result of which a fund had been brought into court, asking that out of this fund they should be allowed reasonable compensation for their services. The court below held this to be proper and entered a decree in favor of the solicitors in the sum of \$35,161, and the case was appealed to the Supreme Court of the United States. It appears in the reports of the case, (as published in Book 38, at page 913, of the Edition of the "Lawyers' Co-operative Publishing Company", which embraces volumes 110 to 113 of the reports of said Supreme Court) that counsel for appellants made the points that "if an equity arises at all, it is in favor of those who paid petitioners for the services performed", and that "the performance of a duty, to clients who had paid them to perform it, brought the fund into court, and those who paid for its performance are entitled, if any, to re-imbursment". The Supreme Court reduced the amount of the decree to the extent of awarding to the solicitors (appellees) the sum of \$17,560, with interest. Mr. Justice Harlan, in delivering the opinion of the court said (113 U.S. 184; italics ours): "It is clear that within the principles announced in Trustees v. Greenough, (103 U.S. 337) Branch, Stone & Co. and their co-complainants are entitled to be allowed, out of the property thus brought under the control of the court, for all expenses properly incurred in the preparation and conduct of the suit, including such reasonable attorney's fees as were fairly earned in effecting the result indicated by the final decree. And when an allowance to the complainant is proper on account of

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solicitors' fees, it may be made directly to the solicitors themselves without any application by their immediate clients."

The opinion then proceeded to discuss the contention that, as complainants had not incurred an obligation to pay the amount awarded, the allowance was improper, and the conclusion was reached (pages 126-127) that the services of counsel were to be estimated on the basis of what had been accomplished not merely for the complainants, but for the entire class.

Counsel for defendants further argue that "the rule that an allowance of fees in a chancery proceeding must be in favor of the party and not in favor of his solicitor, is of uniform application". They cite decisions of the Supreme Court of this state (McMullen v. Reynolds, 200 Ill. 504, 508; Lilly v. Shaw, 59 Ill. 72) to the effect that in partition suits "it is erroneous to enter judgment and order execution for costs in favor of one not a party to the suit, unless express authority for so doing is given by statute". They also cite two California decisions (McKee v. Soher, 71 Pac. Rep. 438-9; In Re Scott's Estate, 83 Pac. Rep. 85-88) to the effect that in the administration of estates allowances for attorneys' fees should be made to the administrator or executor and not to the attorneys directly. They also cite several Illinois decisions (Anderson v. Steger, 173 Ill. 112, 118; Callies v. Callies, 91 Ill. App. 305; Miles v. Miles, 102 Ill. App. 150, and others) to the effect that in suits for divorce or separate maintenance an allowance for solicitors' fees should be made to the wife and not to her solicitor. Referring to these decisions in divorce, etc., suits, it is to be noticed that section 15 of our Divorce Act expressly provides that "the court may require the husband to pay to the wife, or pay into court for her use, \* \* \* \* \* such sum or sums of money" etc., and that our statute in relation to proceedings for separate maintenance by married women (Chap. 68, Sec. 22, Hurd's Stat.) provides that "the court may grant allowance to enable the wife to prosecute her suit as in cases of divorce". We think that these divorce, etc., cases, as well as the partition cases and the cases where estates are being administered, cited

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Information without any application for a writ of habeas corpus.

The court then proceeded to the question of the defendant's guilt.

It was not necessary to consider the defendant's guilt.

The defendant was charged with the commission of a crime.

(See also the opinion of the court in the case of the defendant.)

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by counsel, are much different in character from the present case, and that the rule therein announced is not applicable to the facts of the present case.

After careful consideration we are of the opinion that, under the facts of this case and under the authority of the Pettus case, supra, and the other cases cited by counsel for plaintiff, the chancery court not only had the power to make said award of \$5000 to the solicitors of the complainants in said chancery litigation but also that the court did not err in so doing. The conclusion follows, we think, that the contention of counsel for defendants, that said award was in effect an award to said complainants because said court had no power or authority to make the award except to said complainants, is without merit. And, in our opinion, the decisions in Pike v. Pike, 123 Ill. App. 553, 557, and Stuart v. Boulware, 133 U. S. 70, 90, cited by counsel for defendants, when read in connection with the facts of each of those cases, do not support a contrary conclusion in view of the facts of the present case.

It is apparent from the evidence, we think, that there was a fund to be preserved and that the services rendered by plaintiff and defendants herein in said chancery litigation were such as were not alone for the benefit of said complainants but for others in the same class. The court expressly found in said decree that said services were "for the benefit of the fund and all parties in interest". Plaintiff testified that "there were a lot of people interested in the fund besides my clients", and that when he talked to Mr. Moore, before the entry of said decree, as to an allowance of fees, he suggested to him that "the fund should pay solicitors' fees", that the fees, if allowed, be divided equally between plaintiff and defendants, and that Mr. Moore agreed to this, but expressed doubt as to whether they could



get an allowance. While Mr. Moore denies making any such agreement, it appears from his testimony that in the negotiations which followed as to the several allowances for fees, counsel for the Clark estate and counsel for complainants both claimed that they had rendered valuable services for the benefit of the fund, that counsel for the Clark estate proposed to ask that their fees be paid out of the fund, that possibly both counsel for the Clark estate and counsel for complainants were in a position to prevent either from obtaining any allowance, and that finally it was agreed that the several allowances should be asked for in the amounts named in the decree. By the terms of the decree the allowance of \$5000 was to the "counsel" for complainants. By said decree, also, the executors were ordered to pay, out of the available funds in their hands "in carrying out said decree under the Master's directions", various sums of money, including the sum of \$5000 to the solicitors for complainants, and by the decree of December 5th it appears that said sum had been paid to said solicitors and a receipt taken therefor. Inasmuch as it was well known that plaintiff and defendants were the solicitors for said complainants, it is a fair inference, we think, that the Master would require that the names of both plaintiff and defendants should appear on said receipt at the time of the passing of the check. And, in fact, the defendant Moore signed both the names of plaintiff and defendants to said receipt at that time, and, in the language of said document, acknowledged receipt of said sum of \$5000 "in full payment of the amount due to the undersigned as complainants' solicitors" under said decree. By this act, we think, the defendants must be held to have accepted the benefits of the decree, notwithstanding the subsequent action of the defendants in crediting the complainants with the entire sum on an indebtedness then owing from said complainants to the defendants for





fees, and, in our opinion, in this collateral proceeding the defendants cannot now be heard to say that said award was in effect an award to said complainants and not directly to plaintiff and defendants herein. The chancery court certainly had the power or jurisdiction to make the award directly to the solicitors, and, even if the court erred in so doing, the decree is binding upon the parties to said litigation and all others whose interests were affected thereby. (Stempel v. Thomas, 88 Ill. 148; Bryant v. Ballance, 88 Ill. 188; Iverson v. Loberg, 88 Ill. 179; Weigley v. Watson, 125 Ill. 64.)

Inasmuch as it appears from the evidence that plaintiff has from time to time been paid for services by said complainants in accordance with the provisions of the contract of June 17, 1903, it is argued by counsel for defendants that plaintiff, after being paid for all his services in the case by his clients, should not be entitled in equity to additional pay, for some of the same work, from other persons with whom he had no contractual relations, merely because those persons happened to have benefited thereby. A sufficient answer to this is, we think, that the proper place to have urged this point was before the chancery court at the time the allowances were made. It also appears from the evidence that no agreement has been arrived at between plaintiff and his clients as to the additional compensation, provided for in said contract, in the event of a settlement or successful issue of the litigation in which plaintiff was employed, and that plaintiff has a suit now pending against his said clients. If any equities or rights arise out of the final determination of this case in favor of said clients in respect to the matters involved in plaintiff's said suit they can probably be adjusted in that litigation.

It is also contended by counsel for defendants that the special interrogatories, submitted to the jury on the court's own





motion, should not have been so submitted, and that the court erred in not granting defendants' motion to set aside the special findings of the jury, answering said interrogatories. It appears that the court, before submitting the interrogatories, asked the respective attorneys if they had any objection to their submission and that the attorney for defendants replied that he had no objection but that he considered them immaterial. It is well settled that an objection to the action of the court in the trial of a case, in order to be preserved for review, must be made in the trial court. (Chicago Hanson Cab. Co. v. Havelick, 151 Ill. 179, 181; People v. Lee, 246 Ill. 64, 71). Not having objected at the time to the submission of said interrogatories, defendants cannot here urge that their submission was error. But assuming that these interrogatories asked the jury for special findings on immaterial facts, as contended by counsel for defendants, we do not think that the judgment should be reversed on that account. The special findings returned were not inconsistent with the general verdict. If the special findings were on immaterial facts and if those findings had been just the opposite to what they were, still the general verdict would not have been affected. (Jacksonville, etc. R.R. Co. v. Southworth, 135 Ill. 250, 257.)

Finding no reversible error in the record, the judgment of the Municipal Court is affirmed.

AFFIRMED.



281 - 18321.

HARLEY MEEK, a minor, by Mattie  
Gerbaums, his mother and next  
friend,

Plaintiff in Error,

vs.

CHICAGO RAILWAYS COMPANY,

Defendant in Error.

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

1831.A. 272

MR. PRESIDING JUSTICE GRAVES  
DELIVERED THE OPINION OF THE COURT.

This is a writ of error to test the correctness of the action of the Circuit Court in extending time for the filing of the bill of exceptions in the case of Meek v. Chicago Railways Company, (No. 18034) in this court on appeal, and in entering an order for the filing of such bill of exceptions nunc pro tunc. The identical orders sought to be reviewed in this writ of error were properly involved in and were considered and disposed of in the case on appeal. This writ of error is, therefore, dismissed.

WRIT OF ERROR DISMISSED.





24 - 18039.

PHILIPP WERNER,  
Defendant in Error,

vs.

HENRY WIETOR and NICHOLAS J.  
WIETOR, co-partners doing  
business as WIETOR BROTHERS,  
Plaintiffs in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

183 I.A. 273

MR. PRESIDING JUSTICE GRAVES  
DELIVERED THE OPINION OF THE COURT.

Plaintiffs in error are florists. On the premises where their greenhouse is located there is also a barn. In the loft of this barn is an oat bin. This bin is entered only from the loft by means of a step ladder reaching from the floor of the loft to a platform formed by planks that project out from the wall of the bin into the loft about eighteen inches and extend into and across the bin, forming a bridge or walk to the opposite side of the bin, where there is a door in the outer wall of the barn, through which the grain to be deposited in the bin is conveyed in pails from wagons below. This bridge or walk is seven or eight feet above the bottom of the bin. It is composed of three 2 x 6 inch planks about twelve feet long, lying side by side and on a level with the bottom of the door. On the same level and immediately in front of the outside door in the bin is a platform on which the person stands who empties the pails of grain as they are sent up. Above the platform at the top of the step ladder there is an opening into the loft twenty-two inches wide and five feet and six inches high. There is no opening into the bin through which light penetrates except the two openings mentioned. In the loft out-



side of the bin there are four windows. When the loft is well filled with hay all of these windows, except one, are covered and admit little or no light. The outer door of the bin through which grain is brought in is opened and closed from the inside. To open it it is necessary to climb the ladder from the floor of the loft to the platform and cross the bin on the eighteen inch bridge or walk. Defendant in error had been employed by plaintiffs in error in and about the business for some time, but had never been in the oat bin above described and did not know how it was constructed beyond the facts that it was entered from the loft and that grain was taken in through the outer door by a person who stood on something not observable from the outside. On the day in question a load of oats was brought to the barn and Henry Wieter, one of plaintiffs in error told defendant in error and a fellow workman to go and unload the oats, and that was all. No directions were given as to how it should be done or which one of the employees should go up into the bin. Neither was any warning of danger or any information as to how the bin was constructed given. Defendant in error went into the loft, ascended the ladder to the entrance of the bin, stepped his left foot into the bin and on attempting to take the next step his right foot missed the planks of which the bridge or walk was composed and he fell to the bottom of the bin and was injured. He brought suit in the Municipal Court and obtained a verdict and judgment for \$500.

We are asked to reverse the case because the evidence fails to show negligence on the part of plaintiffs in error or due care on the part of defendant in error.

It is the duty of the master to use reasonable care to furnish the servant a reasonably safe place in which to work. It is also the duty of the master to warn the servant



of any dangers connected with the work which he is directed to perform that are not known to him or reasonably obvious on ordinary observation. Walen v. City of Chicago, 84 Ill. App., 311; Kirk v. Shally, 79 Ill. App., 64.

Whether or not the bin into which defendant in error was required to enter in order to perform the work required of him was, in view of all the conditions shown, a dangerous place was a question of fact for the jury. Pressed Steel Car Co. v. Harath, 307 Ill., 376; Illinois Steel Co. v. Ryeka, 300 Ill., 280. We think the finding of the jury that it was such a place is amply supported by the evidence. While several witnesses testified that at different times when they observed it, they were able to see the conditions there, there is no proof that the condition as to light was the same when they observed it as when defendant in error attempted to enter the bin. He testified that when he attempted to enter it, it was so dark that he was unable to see anything inside of it, even after he had reached the entrance to it. The decided weight of the evidence tends to show that he did not know anything about the conditions inside the bin, and there is nothing to indicate that plaintiffs in error had any reason to suppose he knew of the dangers to which he would be exposed in unloading the oats. Under these circumstances it was the manifest duty of plaintiffs in error, when directing defendant in error to do work that would necessarily require him to enter the bin, to inform him as to the conditions there that might not in view of the unlighted condition of the bin be observed by him.

On the question whether defendant in error was guilty of contributory negligence, the law is well settled that the servant has a right to assume that the master will not expose him unnecessarily and without warning to dangers of which he is ignorant, and when directed to perform a given service he





has a right to rest assured that there is no danger in its performance of which the master has not advised him. Ill. Steel Co. v. McFadden, 196 Ill., 344; Ill. Steel Co. v. Rysha, 108 Ill. App., 347; Hess v. C. B. & Q. R. R. Co., 87 Ill. App., 624.

As already suggested, the evidence fairly tends to show that defendant in error was ignorant of the conditions of the bin and that when he entered into it it was so dark that he could not see those conditions.

It was a question of fact for the jury to determine, in view of the directions of his master to do the work without warning him of any danger in so doing and in view of the condition of the bin as to light or the lack of it, whether defendant in error exercised such care for his own safety at and just before the time of the injury as a reasonably cautious and prudent person would have exercised under the same or similar circumstances.

The jury found he was in the exercise of such care and we can not say their finding is so manifestly contrary to the weight of the evidence as to warrant a reversal of the judgment.

Finding no reversible error in the record, the judgment is affirmed.

JUDGMENT AFFIRMED.

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March Term, 1923, No.

188 - 18199.

SIEGFRIED SCHULEIN, Jr.,  
Plaintiff in Error,

vs.

MICHAEL T. TULLY,  
Defendant in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

183 I.A. 275

MR. CLARENCE JUSTICE GRAVES  
DELIVERED THE OPINION OF THE COURT.

On August 19, 1910, plaintiff in error leased from defendant in error for residence purposes a flat in a flat building then being constructed, for the term of two years and six months, beginning October 1, 1910, at a monthly rental of \$50 per month, payable in advance. It was stipulated in the lease, among other things, that the bath room should be equipped with shower bath fixtures and that the kitchen door and windows and large double glass door in front should be equipped with burglar catches and bolts. There is a controversy between the parties as to whether the flat was finished and ready for occupancy on October 1, 1910, but in any event plaintiff in error did not take possession of it until October 15th of that year. At the time of the leasing plaintiff in error was occupying a flat under a lease that expired September 30, 1910. Between October 1st and 15th, 1910, plaintiff in error with his family roomed at a hotel, and in the meantime stored his goods in a warehouse. The burglar bolts and catches stipulated for were not furnished by the landlord. For the shower bath fixtures stipulated for the landlord furnished a "spray" fixture, which, as near as can be determined from the record, was a small cheap apparatus designed to be connected with the ordinary water inlet to a bath tub by a small rubber hose and to be held in the hand

379 A. 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840



of the bathor while in use. Plaintiff in error bought and installed the burglar bolts and catches at a cost of \$1.05 and a shower bath fixture at a cost of \$27, the usual and customary market price of which was shown to be \$25. It was stipulated on the trial that the actual rental value of the flat from October 1 to October 15, 1910, was \$25. Plaintiff in error brought suit in the Municipal Court to recover of defendant in error for the items contained in the following itemized bill:

"Room rent for plaintiff and family from October 1 to October 15, 1910, inclusive.....	\$55.00
Storage from October 1 to October 15, 1910, inclusive, and cartage from warehouse to said flat of plaintiff's household goods.....	28.00
Car fare for plaintiff October 1st to October 15th, inclusive.....	1.00
Burglar catches for doors and windows of said flat installed.....	1.50
Window shades for said flat.....	10.81
Shower bath for said flat.....	27.00
Cleaning flat.....	2.50
	<u>\$125.81</u>

The jury found the issues for plaintiff in error and assessed his damages at \$25, and judgment was entered on the verdict. Plaintiff in error being dissatisfied with the amount of the damages assessed brings this record here by writ of error and insists that the trial court erred in refusing to permit him to introduce evidence to corroborate his own testimony that the flat was not ready for occupancy by October 1, 1910, and in striking from the record and excluding from the consideration of the jury all evidence in relation to the items in his itemized bill, for room rent from October 1 to October 15, 1910; for car fare; and for expenses of cartage and storage of his household goods. He also argues that the court erred in instructing the jury as to the measure of damages, but as to such instruction he has failed to assign error and, therefore, that question is not presented for our consideration.



Whether the flat was ready for occupancy on October 1, 1910, was one of the controverted questions of fact in the case. It was error for which this case must be reversed for the court to refuse to permit plaintiff in error to corroborate his own testimony on that issue.

It is conceivable that a state of facts might be shown in this case warranting the recovery of the enumerated items as special damages arising from the failure of a landlord to have the demised premises ready for occupancy by the stipulated time, but the record in this case shows no such state of facts. It was, therefore, proper that the evidence introduced be excluded.

If in fact the flat was not ready for occupancy on October 1, 1910, plaintiff in error was entitled to recover of defendant in error the cash market value of the leasehold interest for the time he was kept out of possession by reason of the fact that it was not ready for occupancy. Birch v. Wood, 111 Ill. App., 336; Griesheimer v. Rothman, 108 Ill. App., 303; Green v. Williams, 45 Ill., 306. It is stipulated that if there is a right of recovery for this item the damage would be \$25.

If the landlord failed to furnish fixtures that he agreed to furnish, the tenant had the right to buy and install the same and recover of the landlord the necessary costs of so doing. Kishell & Co. v. Doggett, 62 Ill. App., 505.

In view of the fact that this case must be re-tried it would not be proper to discuss the evidence in detail. To say the most for it, the only items for which, under the evidence here, plaintiff in error could recover are \$25 for the value of the leasehold interest, \$25 for the shower bath fixtures furnished and installed by him, and \$1.05 for the burglar bolts and catches furnished and installed by him.



What the evidence on the next trial may show, of course, we can not predict.

For error in the exclusion of competent evidence on a material issue in the case the judgment of the Municipal Court is reversed and the cause is remanded to that court.

REVERSED AND REMANDED.





232 - 12278.

G. W. OVERALL,  
Plaintiff in Error,

vs.

CHICAGO MOTOR CAR COMPANY, a  
corporation,  
Defendant in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

183 I.A. 276

MR. PRESIDING JUSTICE GRAVES  
DELIVERED THE OPINION OF THE COURT.

Plaintiff in error brought suit in the Municipal Court to recover damages growing out of the purchase by him of a Landsulet automobile body from defendant in error, claiming that the same was warranted by the defendant in error to be properly constructed and perfect in every respect, and that the same was not as warranted.

Plaintiff in error's claim also included an item of \$5.78 for an over payment by him to defendant in error on a bill rendered. There is no dispute that the claim of \$5.78 was a just claim. The case was tried with a jury. At the close of the plaintiff's case, the court on motion of defendant in error instructed the jury to find the issues for plaintiff in error and to assess his damages at \$5.78. Judgment was entered on this verdict. It is claimed the court erred in giving the peremptory instruction and in ruling on the admission of evidence.

The settled rule in this state is that a peremptory instruction to find the issues for the defendant is proper where there is no evidence in the record which standing alone with all reasonable inferences to be drawn therefrom fairly tends to support the plaintiff's case. Libby, McNeil & Libby v. Cook, 222 Ill., 206.

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The peremptory instruction in this case was a direction to the jury to find the issues for the defendant as to the claim for damages growing out of the purchase of the automobile body and the warranty of the same and the rule announced in Libby, McNeil & Libby v. Cook, supra, applies.

In order to establish the case of plaintiff in error, it was necessary to establish the purchase, the warranty, a breach of the warranty and damages. The purchase and warranty are conceded by counsel for defendant in error. There is ample proof in the record tending to show a breach of the warranty, but there is no proof from which the jury could determine the amount of the damage sustained. For want of evidence from which the jury could assess the damages plaintiff failed to establish his right to recover. It was, therefore, not error to give the peremptory instruction.

The measure of damages was the difference between the actual value of the property at the time and place of the delivery and what it would have been worth if it had been as warranted.

There is some evidence in the record tending to show what the body purchased would have been worth, if it had been as warranted, but there is no proof of what it was worth in the condition it was in fact in when it was delivered.

There was an attempt made by plaintiff in error to prove what it was in fact worth when delivered, and one witness, Buell B. Dutton, testified that it was valueless. This evidence was, however, stricken from the record by the court sua sponte. The reason for so doing is not apparent from anything in the record, and we are unable to conceive any justification for so doing. The witness had shown himself to be qualified to express an opinion and plaintiff in error





was entitled to have the benefit of that opinion. At least two other proper questions were asked of this witness in an attempt to get before the jury his estimate of the value of the body at the time it was delivered to plaintiff in error, to which objections were sustained by the court.

Plaintiff in error while on the stand also qualified as a witness to the value of the body as warranted, and as it in fact was when delivered. He testified he knew the cost of such bodies and what they sold for on the market; that he had been familiar with them for ten years, and had examined and priced nearly every make in Chicago. Yet the court held he was not a competent witness and refused to allow him to testify on the question of value.

For errors of the court in rulings on the admission of evidence the judgment is reversed and the cause is remanded to the Municipal Court.

REVERSED AND REMANDED.

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332 - 17868.

October Term, 1911. No.

PEOPLE OF THE STATE OF ILLINOIS  
ex rel. CLARENCE H. VENNER,  
Appellee,

vs.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

CHICAGO CITY RAILWAY COMPANY, a  
corporation, T. E. MITTEN, presi-  
dent, and R. B. HAMILTON, secretary,  
Appellants.

183 I.A. 283

MR. JUSTICE BAUME DELIVERED THE OPINION OF THE COURT.

On March 26, 1908, Clarence H. Venner, the owner of 200 shares of the capital stock of the Chicago City Railway Company, filed his petition in the Superior Court for mandamus against said company and T. E. Mitten, its president, and R. B. Hamilton, its secretary, to compel the respondents to permit him to examine the books, records and accounts of said company. The respondents answered said petition and a demurrer interposed by the relator to said answer having been carried back to the petition and sustained, the relator elected to abide by his petition and the same was dismissed. This judgment of dismissal was reversed by the Supreme Court in Venner v. Chicago City Ry. Co., 248 Ill., 170, where it was held that the relator's right of inspection of the books, records and accounts of the respondent railway company was referable to section 13 of the general Incorporation Act, and the case was remanded to the Superior Court for further proceedings in accordance with the views expressed in the opinion. Upon the re-docketing of the cause in the Superior Court demurrer was overruled as to the petition and sustained as to the answer, and thereupon the respondents filed their amended answer, to which the relator interposed a general and special demurrer which was sustained by the court, and the respondents,

1882

having elected to abide by their said amended answer, a peremptory writ of mandamus was directed to be issued against the respondents commanding them, forthwith, to admit the relator and his duly accredited representative or representatives, and to give to him or them access to all of the books of account and records of the said Chicago City Railway Company, including the records of the Board of Directors, Executive Committee and stockholders of said company, and of all the contracts entered into by said company with any and all persons, and it was ordered that said admittance and access be permitted from day to day during business hours and in such a manner as not to interrupt the order of business of the corporation until said examination shall have been completed and that the relator or his duly accredited agents may take such memoranda or copies of such entries or records as in the judgment of the relator, his representative or representatives may be deemed necessary, and further that said examination shall not reach back beyond the year 1901.

To reverse said judgment, the respondents prosecute this appeal.

The amended answer filed by the respondents is, in substance, as follows:

"Respondents admit that the relator appears on the books of the company to be the owner of certificates numbered and dated and issued as stated in the petition, and that the respondents company was incorporated as stated in the petition, and executed a trust deed as stated in the petition, but deny that the number of bonds to be issued thereunder is unlimited and admit that the board of directors may borrow such limited amount as is stated in said petition. Respondents admit that the relator made request of the respondent Mitten in a letter dated June 18th, 1907, prior to said date of said trust deed as stated in said petition but deny that said Mitten failed or refused to answer said inquiries. Respondents deny that the board of directors are guided by J. P. Morgan & Company or any of them, or that said J. P. Morgan & Company claim to act for or represent any majority of the stockholders or stand in any fiduciary relation as stated in the petition or that the said board has permitted J. P. Morgan & Company to gain any advantage or benefit as





stated in the petition, and deny that the respondent corporation has improperly or unlawfully or corruptly spent any money for the purpose of influencing voters as stated in the petition or for any purpose, or that any amount of money spent for such purpose can be discovered through an inspection of the books of said corporation or any other irregularities or breaches of trust as stated in the petition or at all, or that it is the intention of the respondents to suppress any such facts.

Respondents admit one, Zoline, to have been appointed as agent and representative of relator as stated in the petition, but deny any presentation of a power of attorney or demand except as thereafter stated, and deny that the secretary had full charge or control of the books and records so alleged to have been demanded but admit that said secretary stated as is charged in the petition and admit that said Zoline called upon said secretary and then upon one, McIlvaine, and then upon said Nitten and was referred to one, Bliss, as stated in the petition, but deny any demand except as thereafter stated.

Respondents deny the allegations of said petition as to the negotiations of said Zoline with said Bliss except as thereafter stated, and deny that said Bliss stated to said Zoline that the information furnished was all that would be furnished or that said Bliss ever refused or was ever authorized by the respondents or said board of directors to refuse said Zoline the privilege of any further examination of said books and papers. Respondents deny the request for said examination of said books and papers, was not made for speculative purposes or to gratify idle curiosity or that said relator seeks the writ of mandamus as a stockholder for legitimate purposes or for the protection of his rights or those of the said corporation. Respondents state that the relator had never made or caused to be made demand for permission to inspect and examine the records, books or papers of said corporation, except as thereafter set forth respecting the request of said relator, by his said attorney, to obtain a list of the stockholders and to examine the resolution of the board of directors authorizing the issuance of bonds secured by the mortgage of July 1, 1907; that the only demand or demands made by said relator, or by his said attorney, to examine the records and books of said company consisted of a demand to examine generally the books, records and papers of said company, without specifying or suggesting what particular books or records relator desired to examine, or concerning what period of time covered by said books and records, or any matter by which any books or papers which he desired could be identified; that said relator at no time represented or made known to the respondents, or to either of them, the matter or matters concerning which he desired to inspect said books and records, other than that he desired a list of the stockholders and an opportunity to examine the resolution of the board of directors authorizing the sale of said bonds as aforesaid, nor did said relator at any time exhibit or make known to the respondents, or to either of them, the existence of any claim, matter in dispute or controversy between said relator and said company or any officer thereof, in connection with or concerning which said relator desired to inspect said books and records, nor did said petitioner at any time specify what particular books, papers and records he desired to examine, except the record of the meeting of the board of directors at which was adopted the resolution



authorizing the issuance of bonds, as aforesaid, which record said relator was allowed to examine, and was furnished at his request with a copy thereof, nor did said relator at any time specify the years or period of time covering which he desired to examine the books and records of said company; that the books and records of said company consist of hundreds of volumes, covering the records, accounts and transactions of the company, extending over a period of many years, and that the accumulated files and papers of the company are so numerous and of such bulk as to require a large store room to contain them, and it is and was manifestly impossible to produce all such books and records unless in some way the said relator or his representative identified the limits of the period or in some general way the matters concerning which books and papers were to be produced. Respondents further state that on the 28th day of July, 1907, said Zoline called upon said Bliss, of counsel for said company, with reference to the demand of said relator to inspect the company's books and records; that said Bliss then and there requested said Zoline to state what information the relator desired and what book or record he wished to examine, in reply to which request said Zoline stated that he desired a list of the stockholders of said company and to examine the resolution of the board of directors authorizing the issuance of the bonds secured under said mortgage of July 1st, which was all the information stated or suggested by said Zoline which he or the relator desired, and the only cause or reason assigned for desiring an inspection of said records and books; that thereupon said Zoline was permitted to examine, without objection, the record book of said company, containing, among others, the minutes of the meeting of the board of directors at which was adopted the said resolution authorizing the issuance of bonds as aforesaid; that said Zoline then and there proceeded to and did examine, without interruption, said record book and made notes and memoranda therefrom; that after he, said Zoline, had examined said book for about an hour he voluntarily returned the said book and asked if he could be furnished with a copy of said resolution, as it was of great length and would require considerable time to copy; that on the following day, or the day thereafter, a copy of said resolution, together with a list in writing of the stockholders of said company, were furnished to said Zoline by said company as requested; that thereafter said relator, without making any further demand, left at the office of said company, on August 1, 1907, a copy of the notice attached to said petition, and without making any further demand or request, and without further communication on the subject and without waiting to receive any answer to his demand, filed, on the same day, his petition for mandamus in this cause, having prepared said petition previous to the service of said notice, and the respondents on information and belief allege that said petition was filed before said demand was delivered at the office of said respondent corporation.

Respondents further state concerning the matters mentioned in said amended petition respecting the alleged relations between said company and J. P. Morgan & Company, and the payment of a commission for the sale of said bonds, and the alleged payment by the respondent company of moneys for the purpose of influencing votes in favor of said ordinance; that said matters were never brought to the attention of the respondents or either of them by said relator, or by his representative, prior to the filing herein of said amended petition; that the first notice or claim made by said relator





in respect to said matters or either of them was by the filing in his said amended petition, nearly eight months after the filing of his original petition; that in respect to the matters last above mentioned the respondents state that the relator has not shown any irregularity or misconduct in the payment of commissions to said Morgan & Company, for the sale of said bonds, or in respect to any transaction or relationship between the said company and J. P. Morgan & Company, nor in respect to the alleged expenditure of money for the alleged purpose of influencing voters of the said City of Chicago; that the board of directors of said company are not guided by instructions from said Morgan & Company but said directors, in the management and control of the affairs and business of said company, act in accordance with their own individual judgment, guided only by a sense of duty and responsibility to the company and its stockholders, and with no other desire than to faithfully discharge their duties and subserve the interests entrusted to their charge; that the only money paid to said Morgan & Company by the respondent company was a brokerage fee or commission of two per cent. for the sale of \$7,000,000 of the bonds of said company; that the payment of said commission was approved and authorized by said board of directors, and the action of said board of directors in that behalf, together with the action of said board in accepting the ordinance of February 11, 1907, and in executing the said trust deed of July 1, 1907, and authorizing the sale of the bonds thereunder, was in all respects ratified and confirmed by a resolution of the stockholders of the respondent company at the regular annual stockholders' meeting, held on February 17, 1908, at which meeting there was represented 178,088 shares, out of a total of 180,000 shares comprising the whole of the capital stock of the company, and of which number 178,081 shares voted in favor of said resolution, while only 363 shares in which were included the 300 shares held by the relator, being only one-ninth of one per cent. of the total number of shares of said company, voted against said resolution.

Respondents further allege that the respondent corporation and themselves as officers of said corporation are not required to further exhibit or to allow to said relator any further inspection of the books and papers of said corporation for the reason that the said relator asks and demands such inspection for no lawful or legitimate purpose but on the contrary for the sole unlawful purpose of attempting to levy blackmail upon the respondent corporation and said demand of said relator to inspect said books and papers and said inspection is required by relator solely to advance the purpose on the part of said relator by the threat of exposure of the private and confidential business of said respondent corporation obtained by him to compel said respondent corporation or some one interested in its affairs to pay to relator a large sum of money to be demanded by him as a condition of his not further prosecuting his said demand.

The respondents further allege that the relator formed his said purpose before he acquired or owned any stock in said corporation and having formed such purpose he acquired his said stock not in good faith nor as a bona fide investor in the stock of said company but solely with the design of making a basis for and of advancing his illegal purpose as aforesaid and in connection therewith respondents allege that the circumstances under which the said plaintiff acquired the shares of stock held by him in the defendant company were as follows: that on or about January 11, 1905, a notice was





published in all the principal newspapers in the City of Chicago, and in many of the New York papers, notifying the holders of stock in the Chicago City Railway Company that certain parties representing a syndicate, made up from the stockholders of said company, would purchase at the price of \$200 a share all stock which the holders thereof would deposit with the Illinois Trust & Savings Bank, Chicago, provided a majority of said capital stock was deposited on or before February 15th, 1905; that at the time said notice appeared, negotiations were being carried on between the City of Chicago and said Company, relative to bringing about a settlement of the local traction problem, and there was then pending before the local transportation committee of the city council a proposed extension ordinance along the lines embodied in the ordinance subsequently passed by the city on February 11, 1907; that these negotiations had been pending for several years and had been given the widest publicity throughout the country; that pending such negotiations the city council issued temporary permits from time to time, terminable at the will of the city, permitting said company to continue the operation of its street railway, as substantially all the rights of the company in the streets of the city had previously expired by limitation under prior grants from the city; that on January 24 and 25, 1905, information was published in the daily newspapers of the City of Chicago to the effect that a majority of the stock was in sight, and that there was no doubt but that such majority would be deposited with said bank before the expiration of the period fixed in the notice of January 11, 1905; that two days after this notice appeared, said relator, on January 27th, 1905, made his first purchase of stock in said company; that a few days thereafter, on February 3rd, a notice was published in the newspapers to the effect that a majority of the stock was then deposited, and that payment therefor would be made at once, without waiting until the conclusion of the period fixed in the notice of January 11th; that on the following day, February 4th, said relator bought fifty shares of the stock of said company in the name of his clerk, Truman Taylor; that two days later, said Taylor executed a power of attorney authorizing the transfer of said fifty shares to said relator, and on the same day said relator bought an additional fifty shares in his own name; that subsequently, on July 15, 1905, said relator had the Taylor stock transferred to himself on the books of the company; that thereafter, negotiations between the city and the company were publicly continued, resulting in the passage of the ordinance of February 11, 1907, which ordinance was accepted by the company on April 15, 1907, and on July 1st following, the company executed the mortgage or trust deed securing the bonds of the company, which were to be sold and the proceeds used in rehabilitating the street railway system under the provisions of said ordinance; that before the execution of said mortgage, said relator began his attacks upon the company by addressing a communication, under date of June 18, 1907, to the president of the company, in which he demanded that the president furnish him full information regarding the proposed bond issue, and information respecting the estimated cost of the improvements to be made upon said railway system as contemplated by the directors of said company, if any such action was contemplated; that on June 27th, counsel for the company, in reply to said relator's communication of June 18th, informed the said relator that it was neither usual nor practicable, or in the opinion of the officers of the company desirable for the interests of the company, to



limit the board of directors in the exercise of their powers in the discharge of their duties for the benefit of the corporation, by an advance statement to the stockholders of the expected action of the board; that said relator on June 29, 1907, in reply to said communication, addressed a letter to the president of said company, in which letter said relator gave notice that he protested against the issue and sale of any of the mortgage bonds as proposed, although he knew that such bond issue was absolutely necessary to be made, and he further gave notice that he would take such further action in the matter, looking to the protection of his rights as a stockholder, as he might be advised was proper, and requested the president to bring the letter and protest to the attention of the Board of directors; that two weeks later, on July 18th, said relator addressed a letter to the company, in which he appointed said Zoline as his agent and representative to inspect the books and records of the company containing the minutes of the proceedings of the stockholders, directors and executive committee, and the books of account of said company, and authorized said Zoline to make all demands which he might deem necessary in the premises and to delegate such persons or persons as he, said Zoline, may designate, such parts of the authority thereby conferred as said Zoline might deem expedient or proper; that on July 25th, 1907, pursuant to and in aid of his scheme to wrongfully extort money from said company, and following his usual practices in such cases, and in order to afford a pretext upon which to base the subsequent action taken by him, and which he then contemplated taking, said relator on said date addressed a communication to the company in which he protested against any action being taken by the company under the ordinance of February 11th, on the alleged ground, as stated by him in said communication, that the said ordinance was void and conferred no rights upon the company; that thereafter, and pursuant to said scheme, said relator filed his petition for mandamus in this court on August 1, 1907, and subsequently, on August 15th, 1907, addressed another communication to said company again protesting against any action being taken under said ordinance and followed this protest by filing in the Superior Court a bill in chancery, in which said relator alleged that said ordinance of February 11th was void, and prayed for an injunction restraining the respondent company from proceeding or acting under said ordinance, and that the same should be declared void, and that a receiver should be appointed; that the respondents demurred to said bill, and, upon hearing the demurrer was sustained and the bill was dismissed for want of equity, from which order said relator prosecuted an appeal to the Supreme Court; that in said Supreme Court said decree was affirmed, whereupon said relator sued out a writ of error from the Supreme Court of the United States thereon; that in the event said relator should succeed in his said suit in having said ordinance declared invalid, the result of such success would render practically worthless the shares of stock owned by him and would destroy practically all the rights and franchises of said company to operate street railways in the streets of Chicago, all of which is well known by said relator; that as characterizing and exposing the purpose and intention of said relator respondents allege that said relator is now, and has been for many years last past, engaged almost interruptedly in the business and practice of extorting money from large corporations; that in buying said stock, and in making demands and threats and prosecuting suits against said company said relator has acted in the regular and usual course of his said





business and occupation of attempting to "hold up" and extort money from corporations; that his said practices have been so notorious and unremitting, and have extended over such a long period of time that he has acquired a national reputation of being a professional in that line of business; that in the carrying on of said business he employs numerous clerks and assistants, and as occasions require, or expediency suggests, uses the names of two of his clerks, William H. Francis, and Truman A. Taylor, as complaining stockholders in many of his suits against corporations; that by means of notices in the public press and in financial journals he keeps in touch with proposed important changes or consolidations among the large corporations throughout the country, and upon being thus, or otherwise, advised of any such proposed action, he immediately surveys the situation and if in his judgment it presents a profitable field for extortion by threats he buys a few shares of stock and begins his attack by serving notices of protest upon the company and demands for inspection of the company's books and records, and where notices and threats fail to accomplish his purpose, he institutes a stockholder's suit to prevent or set aside the corporate action complained of, and as auxiliary thereto usually files a petition for mandamus to inspect the books and records of the corporation for the purpose of discovering, if possible, some irregularity or pretext to aid him in further attacks upon the company; that among the number of corporations so attacked by said relator for said purposes are the following, viz.: Chicago, Rock Island & Pacific Railroad Company, the Pullman and Wagner Palace Car Companies, the Amalgamated Copper Company, the Farmers Loan & Trust Company, the United States Steel corporation, the Union Pacific Railroad Company, the Atchison, Topeka & Santa Fe Railroad Company, the Burlington Railroad Company, the Continental Trust Company, the Bay State Gas Company of Massachusetts, the Erie Railroad Company, the Boston and Albany Railroad Company, the New York Central Railroad Company, the American Water Works Company, and the Central Trust Company.

Respondents further allege that in the case of the Rock Island R. R. Co. an important change in the affairs of that company was published in the fall of 1902, and shortly thereafter on November 1st, said relator bought 100 shares of Rock Island stock, and on the 24th of November he bought 50 shares in the name of his clerk, Truman A. Taylor; that a few days later, December 2nd, he served a written protest against the proposed action contemplated to be taken by the company; and on December 26th he made a demand for a list of the stockholders, and three days later, and again, on January 16th, made a demand to examine the books and records of the company; that on January 31st, within two months after he bought the stock, he filed a bill in his own name attacking the reorganization and asked for the appointment of a receiver for the company, and followed this by filing, on April 28th, a petition for a writ of mandamus; that both suits were brought in the Circuit Court of Cook County, and neither suit reached a final determination, relator having procured a settlement, and both suits were dismissed on stipulations signed by counsel after, as respondents upon information and belief allege and so charge the facts to be that said plaintiff had extorted a large sum of money for his settlement thereof, and all of said acts were done for the purpose of such extortion; that in the case of the Pullman and Wagner Companies the proposed plan of consolidation of the Pullman and Wagner Companies was published in October,





1899, and a few weeks later, said relator purchased 100 shares of stock in the Wagner Company in the name of his clerk, William Francis, and on the following day he purchased 100 shares in the Pullman Company in the name of said Truman A. Taylor, and on the same day demanded certain information from the company relating to a circular issued by the Pullman Company outlining the proposed plan of consolidation; that a few days later, on November 28th, and within two weeks from the time he bought the stock, he commenced a suit against the Wagner Company in New York in the name of said Francis seeking to enjoin the proposed consolidation; that his application for an injunction was denied, from which order he appealed and was defeated; that on December 5, 1899, a stockholders' meeting of the Pullman Company was held to vote on the consolidation, at which meeting all stock except relator's voted in favor of the plan; that relator's attorney was present and objected to the action taken and on the same day he sent to the officers of the Pullman Company a copy of a bill in chancery, previously prepared, to enjoin the company from carrying out the plan of consolidation, and receiving no response, he filed a bill in the Circuit Court of Cook County on December 28, 1899; that subsequently he filed a petition in the Superior Court in the name of said Taylor for a writ of mandamus to inspect the books and records of the Pullman Company; that these suits were subsequently settled and were dismissed by stipulation of the parties after, as respondents upon information and belief allege and so charge the facts to be that said relator had extorted a large sum of money for his settlement thereof, and all of his said proceedings were had for the purpose of said extortion; that in the case of the Amalgamated Copper Company the complainant Geer, filed a bill in New Jersey on April 25, 1901, to restrain the company from buying certain copper property, and upon hearing of this suit, said relator, on May 2, 1901, and within a few days after suit was started by Geer, purchased 100 shares of stock of the copper company and on the next day, May 3d, filed a petition to join in the suit as a party complainant. Respondents further allege that in the case of the Farmers Loan & Trust Company, said relator brought the suit in the name of his brother, George L. Venner, to restrain the trust company from engaging in the banking business, which was the chief business of the company; that said relator became a stockholder of said trust company on May 18, 1899, having purchased 100 shares which represented but one-fourth of one per cent, of the company's total capital, and two months later, on August 1st, brought the suit which, if it had been successful, would have put the company out of business and rendered his stock valueless; that, upon review of the case in the Appellate Division of the Supreme Court of New York, that court in its opinion stated that "The capital stock of the defendant company is \$1,000,000, and it in no way appears that any other stockholder is in sympathy with the effort of the plaintiff to restrain the defendant from carrying on what must be regarded as a lucrative part of its business. Whatever may be the plaintiff's motive in instituting such an action, it is clear that the suit is not for the purpose of promoting the interests of the other stockholders or the welfare of the corporation"; that on being defeated in his attack against said trust company in that suit, he brought another suit against the company in the New York Supreme Court to enjoin the company from doing business in Illinois, upon the ground that the company was conducting its business in that state without authority under its charter



and that its acts were ultra vires; that said trust company refused to buy its peace, and said relator was defeated in the litigation; that the acts of said relator aforesaid were done with a view to extorting money from said trust company.

Respondents further allege that in the case of the United States Steel Corporation the board of directors of that company on March 4, 1902, passed a resolution directing the finance committee to prepare a report recommending the retirement of the company's preferred stock to the amount of \$200,000,000 in exchange for bonds; that two days later, March 6th said relator bought some shares of stock in the company, and on April 25th following, filed a bill in the Supreme Court of New York to restrain the company from issuing bonds under a resolution of the stockholders passed May 19, 1902; that on June 9, 1902, said relator's motion for a preliminary injunction was denied by Judge Lacombe, of the U. S. Circuit Court, the suit having been removed from the State Court on application of the defendant, and the acts of said relator aforesaid, were undertaken with the view of extortion as aforesaid.

Respondents further allege that in the case of the Union Pacific Railroad Company, Venner brought several suits against that company, one in the name of his brother, George L. Venner, and one in which relator and relator's clerk, Francis, were co-plaintiffs; that in the latter suit relator himself verified the complaint on February 23, 1898; that he also brought an action in the U. S. Circuit Court for the District of Nebraska against said railroad company, in which suit he testified at Boston, Mass., before a special master, but the master's report was never filed, the litigation having been settled and discontinued on terms satisfactory to said relator; that in one of these suits relator secured an ex parte injunction preventing the company from issuing its refunding bonds, and the company being anxious to make immediate disposition of its bonds, settled with relator, and in that way got rid of relator and the injunction; that all of the acts of said relator were done for the purpose of extortion.

Respondents further allege that in the Atchison, Topeka & Santa Fe Railroad case, relator filed a bill in his own name against the Atchison, Topeka and Santa Fe Railroad Company to enjoin it from acquiring the stock of another railroad company, and a proposed plan of consolidation; that relator purchased his stock in the Atchison Company shortly before he filed his bill, and, in reference to his recent purchase, Justice Brewer in his opinion, said:

"It would seem as though his purchase under such circumstances was an implied recognition of the existence of such assumed power. For, of course, it would not be tolerable for a party to buy into a company with the purpose of invoking the aid of the courts to compel the company to desist from a policy which it was pursuing satisfactory to its then stockholders."

Respondents further allege that in the Chicago, Burlington & Quincy Railroad case, relator purchased some shares of stock in the Chicago, Burlington & Quincy Railroad Company, and immediately thereafter filed a bill in the Federal Court of Iowa to enjoin the Burlington Company of Illinois from leasing its road to the Burlington Company of Iowa; that upon the hearing of the case it was made to appear that relator had in fact bought his stock after the lease which he sought to







enjoin had been made, and he was consequently defeated in his attempt to hold up the company, although his said acts were performed for the purpose of extorting money from said corporation; that among various other suits of a similar character brought by said relator were two suits brought by him against the Great Northern Railroad Company, in one of which he was recently defeated before the United States Supreme Court, the other of which is still pending; that in like manner he sought to prevent the leasing of the Boston & Albany Railroad to the New York Central, the consolidation of the Western State Bank, the Continental Trust Company, and the U. S. National Bank, the reorganization of the Bay State Gas Company of Massachusetts and the plan of consolidation of certain copper property, represented by Messrs. Kidder, Peabody & Co., of Boston.

Respondents further allege that a few of the many other cases in which the conduct and manipulations of said relator in extortionate proceedings have been under review by the courts are the following: Archer vs. American Water Works Co., 50 N. J. Eq., 33, in which the chancery court of New York declared him guilty of fraud and double dealing in connection with the affairs of the Water Works Company, and of fraudulently attempting to deprive other stockholders of their holdings. McVeigh vs. Continental Trust Co., 32 N. Y. Supp., 198, in which it appeared that a mortgage on the Denver Water Works Co. had been foreclosed, and after the property had been bought in on behalf of the bondholders, a reorganization was in process when relator brought an action to embarrass and prevent the proposed plan of reorganization, and in which the court found him guilty of duplicity and misrepresentation, and among other things said:

"It is alleged in the complaint that Mr. McVeigh was in 1898 the owner of 570 shares of the Denver Water Company's stock, and that he is the owner of those shares at the present time, and that the suit is brought by him for the purpose of protecting his interests as a stockholder. It now appears by the distinct statement of Mr. McVeigh that he is not a stockholder in the Denver Water Company and that he has no interest whatever in any of the matters referred to in this suit.\*\*\*\*\*It is plain, as has been said above, that the moving spirit in all this litigation, both in Colorado and here, is Mr. Venner, by whom the complaint herein was verified and who makes the principal affidavit on the motion. His attitude with reference to the whole of this matter has been so inconsistent, so questionable and so peculiar that his present effort to restrain the operations of this new water company does not commend itself to the consideration of the court."

United Water Works Co. vs. F. L. & T. Co., the U. S. Circuit Court of Appeals for the Eighth Circuit found him guilty of fraudulent conduct, Venner vs. F. L. & T. Co., in which the U. S. Court of Appeals for the Fifth Circuit found him guilty of fraud. Holly Manufacturing Co. vs. Venner, in which he was found guilty of willful suppression of evidence in the court of which proceedings he was required to produce his books which he claimed were lost, and in which the court characterized his story as the most surprising and remarkable ever offered in a court of justice and held that the disappearance of his books was by design and not by accident. Appleton Water Works Co. vs. Central Trust Co., in which the United States Court of Appeals for the Seventh Circuit confirmed the decision rendered by District Judge Seaman, holding relator, on an "undisputed showing", and especially on his own affidavit, guilty of fraud, and charac-



terized him as a "schemer"; the mortgagee, the court said is "entitled to protection against such schemes and schemers as appear disclosed in the transactions set forth in this record." *Peabody vs. New England W. T. Co.*, in which the Supreme Court of Illinois, without mentioning him by name, condemned his fraudulent action. *Farmers Loan & Trust Company vs. Alton Water Works Co.*, in which relator was sentenced to one year in jail, and a fine of \$1,000 for refusing to produce his books before the master. *George B. Phelps vs. C. H. Verner*, United States Circuit Court for the Northern District of New York, heard before a referee, in which the referee in his report vigorously condemned the said relator for his fraudulent acts and conduct.

Respondents further allege that said relator in pursuance of his said illegal purpose, and when the said two hundred shares of stock of said relator were not worth to exceed the sum of two hundred dollars per share, or \$40,000 sought to compel and is now seeking by this suit to compel the respondent corporation and its stockholders to pay him at the price of peace and for said stock, a sum many times in excess of its fair market value and that in making this demand for inspection and in instituting this mandamus action, and in instituting said proceeding in chancery, said relator was acting with no lawful or legitimate purpose nor from any honest desire to protect his rights or interests as a stockholder, but said suits were brought and are being carried on by said relator to embarrass said company in the sale of its said bonds, and to compel the company to buy its peace and settle with said relator by the payment to him of an extortionate amount for his shares of stock; that said relator has sought, and is now seeking by said means, to compel the respondents to pay to him an extortionate amount of money to settle this litigation; that the seeking of said demands, and the institution of said suits, were conceived by said relator with the idea that, by demanding and attempting to enforce an examination of said company's books and papers, and instituting said suits, he might so interfere with and impede the sale of the company's bonds, and so harass and annoy the board of directors of said company, and might so cause them apprehension concerning the possible results of permitting a person of relator's reputation to examine said books and thus enable him to distort legitimate information there disclosed concerning the business and affairs of said company, and to bring unfounded suits against said company, that they would surrender to his demands and enable him to succeed in his said unlawful purpose; that this suit does not represent any honest effort on the part of a bona fide stockholder of said company, to make an inspection and examination of the books and papers of said company for the purpose of ascertaining whether the affairs of said company have been properly managed, or for any other legitimate purpose whatsoever, but that this suit and the said chancery suit brought by said relator is wholly in furtherance and in aid of an improper and wrongful purpose and design on the part of said relator to extort money illegitimately from said company; that said petitioner has no beneficial interest to be served, and is not seeking to benefit said company, but is seeking to injure it and all of its stockholders for his own personal gain, and particularly is hoping to discover, through an examination of the books and papers of said company, information which he may be able to distort and seize upon to aid him in his said extortionate purpose; that his aims and interests are directly contrary to the interests of all owners of stock





in said company; that while his said bill in chancery was filed on behalf of himself and all other stockholders who might desire to join, not a single stockholder has made any effort, or expressed any desire, to join him in the said suit; that the holdings of said relator in said company represent but one-ninth of one per cent. of the total shares of said company, and, so far as these defendants are advised, not a single holder of stock in said company is in sympathy with the said relator in his attacks upon said company.

Respondents further allege that the foregoing matters and things respecting said relator, his business and reputation, his frequent condemnation by the courts, his repeated attempts to extort money from corporations, the manner in which he acquired his stock in said company, and the litigation now carried on by him against said company, have been set forth to present and explain, with other facts that will be proven in support of said allegation of unlawful purpose, the real object and purpose of this demand and action as above alleged and the reason why said relator should not be allowed, in response to a mere general demand for leave generally to inspect the company's books and records, to come into the offices of said company and become acquainted, for hostile purposes, with its legitimate, confidential affairs; that said relator's purpose furnishes ample, just and proper grounds for said company insisting upon its legal rights in the premises; that under the facts hereinabove shown, it is believed by the respondents to be the duty of said company to deny said relator, upon the showing made by him, opportunity to examine generally and promiscuously said company's books and papers, and to resist and prevent, so far as it may, his having any such opportunity; that the reputation of said relator is so notorious that if permission and opportunity to examine said books and papers as demanded should be given to him, or to his representative, either voluntarily or otherwise, and the fact should be publicly reported, apprehension of mischievous and illegitimate purposes and objects and probable attacks upon said company by said relator would be widespread among the many persons holding its capital stock, and the sale of said bonds would be materially affected, and a sensible depreciation of the value of their shares and a consequent loss and injury to them would be the result. Respondents further allege that the affairs of said company are being honestly, properly and successfully managed, and that the records and accounts of said company are honestly and correctly kept and are from time to time truly submitted to the stockholders of said company with all practicable fullness; and that the refusal of an opportunity to said relator to examine said company's books and papers in the manner demanded has not been due to any aim or desire on the part of the respondents to conceal any improper, irregular wrongful or unlawful management of the affairs of said company; that in view of the matters and things above set forth and especially of the unlawful purposes of said relator, said relator should not be held to be entitled to examine the books and papers of the said company, and his petition for a writ of mandamus should be denied, etc.





Appellants concede that appellee has the absolute right under the statute to inspect the books and records of the corporation, although he intends to use the information obtained thereby in the interest of a rival concern, or to injure the interests of himself and of his fellow shareholders, or where equity would deny him relief, but insist that where such right of inspection is sought to be exercised for an unlawful purpose, in the sense that by its mandate the court would be lending its aid to the accomplishment of an unlawful act, wherein odium, in the eye of the law, attaches thereto, as for the purpose of levying blackmail, such right of inspection will be denied.

In Stone v. Kellogg, 165 Ill., 192, the court in considering and determining the extent of the right under the Illinois statute of a shareholder to inspect the records and books of account of a corporation, quoted with approval from Foster v. White, 86 Ala., 467, where such right of inspection under a similar statute was involved, as follows:

"The only express limitation is, that the right shall be exercised at reasonable and proper times. The implied limitation is, that it shall not be exercised from idle curiosity or for improper or unlawful purposes. In all other respects the statutory right is absolute. The shareholder is not required to show any reason or occasion rendering an examination opportune and proper, or a definite or legitimate purpose. The custodian of the books and papers cannot question or inquire into his motives and purposes. If he has reason to believe that they are improper or illegitimate, and refuses the inspection on this ground, he assumes the burden to prove them such."

In Vanner v. Chicago City Ry. Co., 348 Ill., 170, it is said:

"Where the right is conferred by statute in absolute terms, the purpose or motive of the stockholder in making the demand for an inspection is not material and he cannot be required to state his reasons therefor. (Thompson on Corporations, - 2d ed. - sec. 4516.) The weight of American authority is to the effect that where the right is statutory the stockholder need not aver or show the object of his



inspection, and it is no defense under a statute granting the absolute right to inspection to allege improper purposes or that the petitioner desires the information for the purpose of injuring the business of the corporation. A clear legal right given by a statute cannot be defeated by showing an improper motive."

It will be observed that the implied limitation upon the right of inspection, as stated in the Stone case, supra, that it shall not be exercised for "improper or unlawful purposes", is not expressly recognized or adverted to in the later Venner case, supra, but it is there said that it is no defense under a statute granting the absolute right to inspection to allege improper purposes and that a clear legal right given by a statute cannot be defeated by showing an improper motive.

Appellants insist that the Venner case, supra, is not to be regarded as necessarily overruling or modifying the Stone case, supra; that the court did not use the word "improper" in the Venner case, as synonymous with the word "unlawful", as used in the Stone case.

For the purposes of the case at bar it may be conceded that the two cases mentioned may be harmonized, and that where it appears that a shareholder seeks to inspect the records and books of account of a corporation for an unlawful purpose, in the sense in which the words "unlawful purpose" are heretofore characterized - as for levying blackmail, - a writ of mandamus to compel such inspection will be denied.

The salient allegations in the answer filed by appellants, in so far as such an unlawful purpose on the part of appellee is sought to be charged, are, that appellee asks and demands such inspection for no lawful or legitimate purpose, but on the contrary for the sole unlawful purpose of attempting to levy blackmail upon the appellant corporation and said demand of said appellee to inspect said books and





papers and said inspection is required by said appellee solely to advance the purpose on the part of said appellee by the threat of the exposure of the private and confidential business of the said appellant corporation obtained by him to compel appellants or some one interested in its affairs to pay appellee a large sum of money to be demanded by him as a condition of his not further prosecuting his said demand; that appellee in pursuance of his said illegal purpose, and when the said two hundred shares of stock of appellee were not worth to exceed the sum of two hundred dollars per share, or \$40,000, sought to compel and is now seeking by this suit to compel the appellant corporation and its stockholders to pay him as the price of peace and for said stock, a sum many times in excess of its fair market value and that in making this demand for inspection and in instituting this mandamus action, appellee was acting with no lawful or legitimate purpose nor from any honest desire to protect his rights or interests as a stockholder, but to embarrass said appellant corporation in the sale of its said bonds, and to compel it to buy its peace and settle with appellee by the payment to him of an extortionate amount for his shares of stock; that appellee has sought, and is now seeking by said means, to compel appellants to pay to him an extortionate amount of money to settle this litigation.

It will be observed that the answer fails to allege any concrete act or acts on the part of appellee - any actual threats or demands by him - upon which a charge of blackmail or attempted blackmail can properly be predicated. In this respect the allegations of the answer are mere argument, conjecture and conclusion. The further allegations of the answer are unavailing to supply requisite substantive statements of fact, and are manifestly made for the mere purposes of such argument, conjecture and conclusion. We conclude that the



answer fails to properly allege an unlawful purpose on the part of appellee, within the meaning of the term as contended for by appellants.

The answer not only admits a general demand by appellee to inspect the records and books of account of the appellant corporation, but it asserts the right and intention of appellants to ignore and refuse such demand. The demand was sufficient. Appellee is entitled to inspect all the records and books of account of the appellant corporation.

The demurrer to the answer was properly sustained and the judgment is affirmed.

JUDGMENT AFFIRMED.

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MARY A. FELGAR, Executrix of the  
estate of WILLIAM H. FELGAR, for  
the use of H. H. FELGAR,  
Plaintiff in Error,

vs.

JOHN L. BOLEN,  
Defendant in Error.)

ERROR TO

MUNICIPAL COURT  
OF CHICAGO.

183 I.A. 284

MR. JUSTICE BAUME DELIVERED THE OPINION OF THE COURT.

On April 11, 1910, plaintiff in error, Mary A. Felgar, as executrix of the estate of William H. Felgar, brought suit in the Municipal Court for the use of H. H. Felgar against John H. Bolen and Edmond S. Holmstrom to recover damages for the alleged breach of a written contract. Plaintiff in error dismissed her suit as to the defendant, Holmstrom, and the case then proceeded to a trial before the court and resulted in a finding and judgment in favor of the defendant Bolen.

The amended statement of claim filed by plaintiff in error is for damages caused by defendant's breach of a written contract dated June 25, 1903, for the sale and conveyance clear of all incumbrances of two certain lots in Cook County, and sets forth that said contract was signed by said Holmstrom by Bolen and Stewart, his agents and attorneys, as vendor, and William H. Felgar, since deceased, as vendee; that plaintiff in error is the executrix of the estate of said deceased vendee; that H. H. Felgar is the assignee of said contract from the personal representatives of said deceased vendee; that said contract was the contract of said Bolen and not of said Holmstrom who had no legal or equitable interest in said property, but merely held the paper or legal title for said Bolen; that plaintiff has complied with



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U.S. DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF INVESTIGATION  
WASHINGTON, D.C. 20535

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all the terms of said contract on his part and has demanded of said Bolen that he comply with his part of said contract, but said Bolen has wholly refused so to do; that said Bolen is in breach of said contract by not furnishing the plaintiff with an abstract of title showing title in the vendor, by not furnishing plaintiff with a title guaranty policy, and by not conveying to plaintiff said premises clear of all incumbrances; that several months following a demand by plaintiff upon said Bolen that he comply with the provisions of said contract, and Bolen's refusal to so comply therewith, plaintiff rescinded said contract and sustained damage by reason of Bolen's breach of said contract as follows: \$730 for money paid on said contract with interest from the several dates of payment, and other damages to which plaintiff was put to carry out said contract on his part, i. e., loss of the use of about \$400 which plaintiff held in readiness for a period of about 18 months to complete said contract, and for the like time spent by plaintiff in meeting and conversing with the defendant in trying to complete said contract; also for loss sustained by plaintiff in not being able to dispose of said premises in exchange for certain property in South Dakota, of which loss defendant had notice.

Upon the trial it was admitted by plaintiff in error that William H. Felgar, the vendee named in said contract, died in the year 1908, leaving a balance of the contract price for said lots unpaid at the time of his death; that he left surviving him his widow, Mary A. Felgar, and a number of sons and daughters as his heirs at law; that since the death of William H. Felgar neither the plaintiff in error nor any one has made any further payments on the contract price of said lots; that on different occasions plaintiff in error and the defendant Bolen talked with each other about the contract and the balance of purchase money due by its



terms and the incumbrances upon the property, including tax deeds; that following said conversations, H. H. Felgar on the 17th day of November, 1909, requested of defendant and obtained a deed to one of the said lots duly executed and acknowledged by George Fisher who at that time held the legal title thereto for the defendant Bolen and again on the 22nd day of November, 1909, requested and obtained from the defendant Bolen a general warranty deed to the other of said lots duly executed and acknowledged by Edmund S. Holmstrom who then held the legal title thereto for the defendant Bolen; that said H. H. Felgar upon receiving said deeds caused them to be recorded in the recorder's office of Cook County, Illinois.

This admission of record by plaintiff in error precludes a recovery by her in this case.

In the first instance plaintiff in error, as executrix of the estate of William H. Felgar, the vendee named in the contract, has no such interest in the subject matter of the contract as will permit her to rescind the same and to maintain an action to recover damages for its breach. Considering the contract alone, if fully performed by the vendee, or if full performance by the vendee was tendered, as is claimed by plaintiff in error, it relates to an interest in real estate, which passed to the heirs at law and not to the personal representative of William H. Felgar. The rule in this state respecting contracts for the sale of land is that from the time of the contract the vendor, as to the land, becomes a trustee for the vendee, and the vendee, as to the purchase money, a trustee for the vendor, who has a lien upon the land therefor. Fuller v. Bradley, 160 Ill., 51; Phoenix Ins. Co. v. Caldwell, 187 Ill., 73. When, however, the vendee in such a contract has fully performed on his part, or





has tendered such full performance, he has an equitable title to the property described in the contract. National Fire Ins. Co. v. The Three States Lumber Co., 217 Ill., 115.

In Fitzgerrell v. Turner, 223 Ill., 322, a deceased vendee, in a contract for the sale of land, who had performed in part only, was, in a proceeding under the statute, recognized as being vested with an equitable title to the land.

Again, the conveyance of the two lots described in the contract constituted the entire subject matter of the contract, to which the provisions relating to the furnishing by the vendor of an abstract, etc., were mere incidents, and, therefore, the demand for and the acceptance of the lots described in the contract, operated to extinguish the contract and merge the same in the conveyances. Laflin v. Howe, 112 Ill., 253; McKnight v. Hewat, 139 Ill. App., 390; Biewer v. Mueller, 254 Ill., 315.

In Harland v. Harpold, 182 Ill., 227, cited and relied upon by plaintiff in error, a portion only of the premises described in the contract of sale were conveyed to the vendee, and the case is, therefore, to be distinguished from the case at bar.

Upon the record as made by plaintiff in error the judgment is right and is affirmed.

JUDGMENT AFFIRMED.

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19798.

ELIZABETH RUFF,  
Appellee,

vs.

HENRY ERICSSON, Commissioner  
of Buildings of the City of  
Chicago, et al., etc.,  
Appellants.

INTERLOCUTORY

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

183 I.A. 304

MR. JUSTICE BAUME DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory injunctional order, entered in the Superior Court on August 29, 1913, as follows:

"On motion of solicitor for complainant, it is hereby ordered that an injunction issue as prayed in said bill, restraining Henry Ericsson, commissioner of buildings of the City of Chicago, Lawrence E. McGann, commissioner of public works of the City of Chicago, Geo. E. Young, commissioner of health of the City of Chicago, John McKeeney, general superintendent of police of the City of Chicago, their agents and attorneys from interfering with or in any way inhibiting the complainant from proceeding with the removal of the building mentioned in said bill of complaint, it is hereby ordered that a writ of injunction issue thereon, upon the filing of a bond therein in the sum of \$1,000."

It will be observed that the writ of injunction is ordered to be issued upon the filing of a bond in the sum of \$1,000. No bond has been filed and no writ of injunction has issued. The order does not in terms make the injunction operative or effectual until the filing of a bond as required, and conformance with this requirement is optional with appellees.

In Lichtstern v. Rosenbaum Grain Co., 176 Ill. App., 250, where a similar order was involved, it was said:

"The order does not, in terms, enjoin or restrain the defendants from doing anything, nor does it, in terms, expressly require the complainant to file the specified bond, nor fix any time within which he may file it. It is, therefore, entirely optional with him when, if ever, the injunction shall issue. The record does not show that any injunction bond was ever filed, nor any injunction actually 'issued'.\*\*\*\*\*

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It is an elementary principle in the law of injunctions, that 'the utmost care should be observed in the granting of preliminary injunctions', and that such an injunction 'should only be allowed upon a clear necessity being shown of affording immediate protection to some right or interest of the party complaining which would otherwise be seriously injured or impaired.' 1 High on Injunctions, sec. 10. By the terms of this order, however, the court in effect delegated to the complainant the power of deciding for himself whether his need was urgent or otherwise, and placed in his hands the right to use or not to use, in his discretion, the 'strong arm of the court'. Until the complainant shall decide whether he needs an injunction and whether his need is sufficiently urgent to induce him to file a bond for \$100,000, no injunction can 'issue' under the order of the court. Until then, the order, in itself, has no restraining force or effect, for there is nothing elsewhere in the order which either expressly or by implication, enjoins or restrains the defendants from continuing the practice complained of. They could not be punished for contempt for so doing, for the reason that such an order has no force or effect as an injunction until the prescribed condition is performed. *Winnlow v. Nyeon*, 115 Mass. 411; *Clarke v. Hoomes' Ex'rs*, 2 Hen. & W. (Va.) 83; *State v. Irwin*, 30 W. Va. 404; 2 High on Injunctions, secs. 1429, 1820, 1631.\*\*\*\*

"Section 123 of the Practice Act, which governs appeals from interlocutory orders, requires an appeal to be 'taken' within thirty days from the 'entry' of the order, and to be 'perfected' in this court within sixty days, whereupon the hearing of such an appeal takes precedence of all other causes in this court. The statute further provides that 'the force and effect of such interlocutory order\*\*\*\*shall not be stayed during the pendency of such appeal.' While it would seem clear from the language of this section of the statute, that the right of appeal would be lost if not exercised within the statutory thirty days from the date when the order is entered by the lower court, whether such order is in force during such thirty days or not, yet it by no means follows that the lower court may properly enter an order purporting to grant an injunction, in such form as to have no restraining force or effect 'during the pendency of such appeal.' The contrary would seem to be clearly implied from the provision above quoted to the effect that the appeal shall not operate to stay the force and effect of the order appealed from. Evidently the legislature assumed, when it enacted this provision of the statute, that no order would be entered granting an interlocutory injunction, until after it has been made to appear that the necessity for such action is urgent, and that such order, when entered, would be immediately effective, or at least, would be made effective within thirty days. If, however, an order is entered which does not expressly enjoin the doing of the acts complained of, but merely provides that a temporary injunction may issue at any time thereafter that the complainant shall see fit to file a bond of a specified amount, or shall see fit to perform some other specified condition, the fact that the order is so entered is, of itself, strong evidence that no such urgency exists as to warrant the issuance of a writ of injunction pendente lite. In our opinion, the order is erroneous in not fixing a short time, not exceeding thirty days, within which the specified condition must be performed, so that if the condition be performed, the interlocutory injunction order will be in force and effect when an appeal is taken therefrom, and this





court will have before it for decision a live question; or, on the other hand, if the condition be not performed within the time limited by the order, then there will be no occasion for an appeal. We think the language above quoted from the Practice Act is entirely inconsistent with the theory that the legislature intended to require this court to hear and determine questions regarding the validity and propriety of interlocutory injunctive orders which are not in force at the time they are brought before us for review, especially in view of the provision requiring us to give such appeals precedence over all other causes."

The authorities cited by the court in the Lightstern case support the doctrine there announced and we concur in what is there said on the subject. The order appealed from is merely a conditional order whereof the condition remains unexecuted.

As the right to take an appeal from the order here involved was required to be exercised within thirty days from the entry of such order this appeal may not properly be dismissed, but as the order did not by its terms require the injunction to become operative and effectual within the time limited for taking an appeal therefrom, so that such appeal, if taken, would present for our consideration and determination a question immediately affecting the status of the parties and the subject matter, it was informally entered and is reversed.

ORDER REVERSED.



134 - 18165.

POST FALLS LUMBER & MANU-  
FACTURING CO., LTD., a  
corporation,

Defendant in Error,

vs.

W. A. MESSER LUMBER COMPANY, a  
corporation,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

183 I.A. 309

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

A judgment of \$275.50 was obtained in an action of the fourth class by Post Falls Lumber & Manufacturing Company against W. A. Messer Lumber Company for a balance due for lumber sold and delivered.

Defendant in error's statement, omitting the formal heading and conclusion thereto, reads thus:

"Plaintiff's claim is to-wit:

Aug. 19, 1910, Car No. 42186			
6/4 C & Btr. West Pine Shop S2S	363 @	\$47.00	\$17.06
" #1	2988	40.00	119.52
" #1	11562	31.00	358.42
" #3	9150	26.00	237.90
June 23, 1910, Car No. 18267			
6/4 #2, Shop S2S 3670 feet	@	31.00	268.77
6/4 #1, " " 4407 "		40.00	176.28

Freight over charges on Car No. 17438  
received from Chicago & N. W. R. R. Co.

51.48  
\$1239.43

Credits

Freight on Car No. 18267	\$176.80	
Sept. 16, 1910, By check	182.39	
Freight on Car No. 42186	311.64	
Nov. 17, 1910, By check	<u>283.10</u>	<u>953.93</u>

275.50"

There was appended to said statement of claim an affidavit of merits by Edward Graff, in substance, that he





was the agent of defendant in error; that said cause was a suit upon contract for the payment of money; that the nature of its demand is for balance as above set forth; and that there is due to it from plaintiff in error after allowing to it all its just credits, deductions and set-offs, the sum of \$275.50.

Four summonses issued in said cause were returned by the officer, "the defendant not found", etc. Service by summons and service by publication, on plaintiff in error were quashed by order of court, June 15, 1911, and Aug. 10, 1911, respectively, after limited entries of appearance for that purpose was entered by it. A fifth summons was duly issued and served on plaintiff in error returnable October 9, 1911, and on that day no general appearance being entered by plaintiff in error the cause was set for hearing, October 16, 1911, before Judge Stewart, at which time for want of an appearance and an affidavit of defense judgment by default was entered against plaintiff in error. Thirty days thereafter, November 15, 1911, a motion to set aside the default and to vacate the judgment was filed by plaintiff in error and overruled by the court.

It is urged that the statement of claim and the affidavit thereto are insufficient to support the judgment whether considered as a pleading or as evidence, because it is not therein stated that the claim is for lumber sold and delivered, and for an overcharge of freight due from plaintiff in error to defendant in error. Section 40 of the Municipal Court Act provides that in actions of the fourth class a statement of claim shall be filed which, if the suit be upon a contract express or implied, "shall consist of a statement of the account or of the nature of the demand." Hurd's Statutes, 1911, p. 734. No formal written pleadings



are required in this class of actions. To any lumberman the above account was stated in words and figures sufficiently for him to understand every item of charge and credit therein, and by it plaintiff in error could fully understand the nature of defendant in error's demand. With such a statement filed the judgment will be sustained, "if upon hearing the evidence he (plaintiff) appears to be entitled to recover and the court has jurisdiction of the defendant and of the subject matter of the litigation". Edgerton v. C. R. I. & P. Ry. Co., 240 Ill., 311. The only evidence heard was the affidavit aforesaid. Proper regard for clients' interests, and commendable pride in doing skillful and efficient work ought, it seems, to suggest to attorneys bringing suits of this character the filing of a fuller and more aptly worded affidavit of claim. When considered, however, with the statement of the account to which it refers, we think the affidavit, under the rules of the court permitting it to be taken as prima facie evidence of the amount due the party suing, was sufficient evidence to support the judgment.

The court did not err in refusing to set aside the default and judgment on the motion and affidavit of plaintiff in error. Under the rules of the court it was required to enter its appearance and to file an affidavit setting forth its defense by or before the return day of the writ, October 9, 1911, unless further time was given to file such affidavit. No appearance was filed by plaintiff in error until October 18, 1911, two days after judgment was entered, and no affidavit of defense was ever filed therewith, and no sufficient excuse was offered for this neglect. No other action was taken by plaintiff in error, until thirty days after judgment was entered, when plaintiff in error sought to have the judgment set aside. No diligence whatever was shown by plaintiff in



error either in the matter of preparing the issues for trial, or in having the judgment vacated. Both diligence and merit must be shown to have a judgment by default set aside, and when it appears that the defaulted party, or his attorney, has failed to exercise due diligence to protect his rights it will not be held an abuse of discretion to refuse to vacate the judgment, however meritorious the defense offered may appear. Hartford L. & A. I. Co. v. Rossiter, 196 Ill., 277; Pitzele v. Lutkins, 85 Ill. App., 662.

The judgment is affirmed.

AFFIRMED.





156 - 18189.

W. A. FOWLER PAPER COMPANY, a  
corporation,  
Defendant in Error,

vs.

BERT JONES SALES BOOK CO., a  
corporation, BERT JONES and  
DAVID M. NICHOL.  
BERT JONES,  
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

1831A. 310

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

Bert Jones sued out this writ of error to reverse a judgment of \$238.20 against him as endorser of a promissory note, executed by Bert Jones Sales Book Company to defendant in error. Judgment by default was entered against the payor and David M. Nichol, who was also an endorser of the note.

Plaintiff in error's affidavit of defense was, in substance, that his endorsement of said note was for the accommodation of the Bert Jones Sales Book Company, and that no notice of non-payment of said note was given him by defendant in error, as required by the statute in such case provided.

The defense of plaintiff in error that there is no legal evidence that the note was ever presented to the payee for payment can not be sustained. Rule 17 of the Municipal Court provides that in fourth class cases evidence of only such defenses as are set out in the affidavit of defense shall be admitted on the trial. It is a general rule of law that every allegation of a declaration or complaint not denied by plea or answers shall for the purposes of the action be taken as true, and the rule is applicable to the allegations of execution, endorsement and demand of payment. 8 Cyc., 203; Williams and Harbut v. Boyden, 33 Ill. App., 477. Moreover,

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THE UNITED STATES OF AMERICA  
DEPARTMENT OF THE INTERIOR  
BUREAU OF LAND MANAGEMENT  
WASHINGTON, D. C. 20250

1881 A. 1881

THE UNITED STATES OF AMERICA  
DEPARTMENT OF THE INTERIOR  
BUREAU OF LAND MANAGEMENT  
WASHINGTON, D. C. 20250

TO THE SECRETARY OF THE INTERIOR  
FROM THE DIRECTOR OF THE BUREAU OF LAND MANAGEMENT  
SUBJECT: [Illegible]

[The following text is extremely faint and largely illegible due to the quality of the scan. It appears to be a formal report or letter, possibly regarding land management or surveying. Key words that are partially visible include "Bureau of Land Management", "Department of the Interior", "Washington, D. C.", "Secretary of the Interior", "Director of the Bureau of Land Management", "Subject", "To the Secretary of the Interior", and "From the Director of the Bureau of Land Management".]

the evidence discloses that the day on which the note was due, May 10, 1908, was a Sunday, and the evidence of Richard C. Williams, a messenger for the First National Bank that had the note for collection for defendant in error, and the evidence of David M. Nichol, bookkeeper for the payor and an endorser, clearly shows that the note was presented for payment by said messenger for said bank to the payor at said address within business hours about 11:30 A. M. of Monday, May 11, 1908, and that payment was refused for want of funds. That evidence is not directly controverted. The holder of the note, or his authorized agent, is the proper person to make the presentment of such paper for payment. Even v. Wilbor, 99 Ill. App., 132; Sec. 108, Chap. 96, Ford's Stat. 1911, p. 1600.

The jury were warranted in finding that plaintiff in error was duly notified of the dishonor of the note. Edward J. Blossom, Manager of said bank, testified that he wrote a letter to each of the endorsers notifying them of the dishonor of the note and passed it to the boy in his department whose duty it was to copy them in the copy book and take them to the mailing department to be mailed. David M. Nichol testified that he and plaintiff in error received such letters from the bank on the day after the note was presented for payment, and that he saw the contents of the letter to plaintiff in error stating, in substance, that the note in question was presented for payment and that payment was refused; that plaintiff in error opened his letter and tossed it to one side of the desk and that he, witness, saw it there on the desk. He also testified that he told plaintiff in error that the note had been presented for payment by the bank and that "we did not have any funds to pay it", and that Mr. Jones said, "We could not take care of it". The book copy of the letter, dated May 11, 1908, showing a proper notice of dishonor, was





also introduced in evidence. Plaintiff in error testified for himself that he never had such conversations, with Mr. Nichol as he testified to, and that he never received any notice concerning that note from either the bank or the payee of the note, and that he was secretary of the payor of the note at the making of the note, but not at the date of its maturity. As the verdict was not against the manifest weight of the evidence, we have no right to reverse the judgment. Plaintiff in error objected to secondary evidence of the contents of the notice of dishonor and moved to exclude all the evidence concerning the writing and mailing of it to him. The evidence of Mr. Nichol and of Mr. Blossom was sufficient proof of the receipt by mail of the notice of dishonor by plaintiff in error to admit secondary evidence of the contents of the notice, when considered with the further fact that his attorney when asked by opposite counsel to produce the original notice stated in open court at the trial, "we are unable to produce it."

The evidence first introduced bearing on the question of mailing the letter may not, when considered alone, have been sufficient to show mailing, but it did no harm to plaintiff in error, as there was sufficient evidence of its having been mailed to and received by plaintiff in error in the testimony of Mr. Nichol and of Mr. Blossom.

Some testimony was offered by plaintiff in error and excluded by the court over his objections, and complaint thereof is made by him. The excluded evidence was not material to the issues herein tried, and the court properly excluded the same. There are other reasons urged as cause for reversal of the judgment relating to the refusal of the court to give certain instructions asked by plaintiff in error. They are all untenable, as are also all the other causes urged, for reasons apparent in what has already been said in this opinion.



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There is no reversible error in the record and the judgment is affirmed.

AFFIRMED.



March Term, 1913, 2.

197 - 18233.

VOIGHTMANN & COMPANY,  
Plaintiff in Error,  
vs.  
CROSS-CONKLIN COMPANY, a corporation,  
IRVING SCHOENBRUN and  
SAMSON SCHOENBRUN,  
Defendants in Error.

ERROR TO

MUNICIPAL COURT  
OF CHICAGO.

183 I.A. 312

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

Plaintiff in error, Voightmann & Company, as subcontractors, sued Irving and Samson Schoenbrun, owners of lots 9, 10 and 11, Block 9, of Duncan's Addition to Chicago, and Cross-Conklin Company, contractor, for furnishing and installing thirteen fire proof doors in a building on said premises and for extra work done there under contract with said contractor. No service was had on Cross-Conklin Company. Without suggestion to, or permission of, the court Edwin G. Day, receiver of Cross-Conklin Company, was summoned as a defendant, but was never made a party to the suit. The evidence fairly tended to prove that plaintiff in error was entitled to a lien on the interest of Irving Schoenbrun for \$442, the only owner served with notice of the claim, and that the owners had that amount of the contract price not paid to the contractor on the contract, and that the contractor owed plaintiff in error \$479.42 for the material furnished and installed. The trial was before the court without a jury, and the record recites: "Plaintiff not desiring judgment against the receiver in bankruptcy of Cross-Conklin Company, nor against the Cross-Conklin Company, the court found for the defendants and entered judgment on the findings."

The only action on plaintiff in error's claim cognizable in the Municipal Court is an action at law in assump-



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suit jointly against the owners and the contractor under section 28 of the Mechanics' Liens Act. The judgment must be against the owner and the contractor jointly for the whole sum due the subcontractor from the contractor, but can only be enforced against the owner to the extent of his liability under said act, and the judgment should find and recite the amount and date of the subcontractor's lien. In case no lien is established against the owner judgment may be rendered against the contractor. See Hurd's State. of 1909, Sec. 28, p. 1438; Harty Bros. v. Polakow, 337 Ill., 659; O'Brien v. Gooding, 194 Ill., 406; Ill. Malleable Iron Co. v. Brennan, 174 Ill. App., 38; Larya Lumber Co. v. Bernstein, 188 Ill. App., 77.

Plaintiff in error was not entitled to judgment against the contractor, because it was not served by process or by publication. It was not entitled to judgment against the receiver in bankruptcy, because the receiver was not a party to the suit, and because it expressly stated to the court, that it did not want such a judgment. Serving a summons on a party without making him party defendant to the suit does not make him a party defendant. As no judgment could be entered against the owners merely, the court properly entered judgment against the plaintiff in error and the judgment is affirmed.

AFFIRMED.



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ERRON TO MUNICIPAL COURT  
OF CHICAGO.

183 I.A. 313

For some days before and on October 7, 1910, defendant Kelly was engaged in installing a steamheating plant at 264 W. 60th place. By an arrangement between Kelly<sup>C</sup> and his employer, the plaintiff Kowalski was employed to assist in such installing under the control and direction of Kelly. Kelly took plaintiff to and from his work in an automobile which he ran himself. In taking plaintiff home the evening of October 7, Kelly ran north on Princeton avenue to 59th street, where he lit the lights on his machine and then turned east into 59th street. There was in that street a double track electric street railway. The south track was the east-bound and the north the west-bound track. Kelly ran his machine a short distance east in the south track and then undertook to get into the north track. The pavement was in bad condition, the street muddy and the top of the rails several inches above the surface of the street. The left-hand wheels of the machine ran over the south rail of the west-bound track, but Kelly was unable to get his auto into the west-bound track and ran east with the left-hand wheels between the rails and the right-hand wheels south of the south rail of the west-bound track. He testified that the wheels "skidded" and for that reason he could not get his machine into the west-bound track, and that when he was within 60 or 70 feet of 5th avenue he saw a west-bound car at the west line of

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5th avenue running towards him at the rate of twenty-five miles per hour. We first saw this car when he turned into 39th street and it was then at Wentworth avenue three to four hundred feet east of Princeton avenue. When he saw the car at 5th avenue he attempted to turn out to the north, but, according to his testimony, the machine "skidded" and he was unable to run his car north out of the west-bound track. When the car was within fifty feet of him he stopped the machine. The car ran on, struck the machine and in the collision the plaintiff received the injuries for which he sued.

MR. PRESIDING JUSTICE BAKER  
DELIVERED THE OPINION OF THE COURT.

The right of recovery is based on the contention that Kelly negligently and carelessly operated his machine. The grounds of reversal urged are that the alleged negligence of the defendant was not proven; that the verdict is against the weight of the evidence and that the plaintiff was guilty of contributory negligence.

We think that the question whether the plaintiff was guilty of contributory negligence in failing to jump from the automobile after it stopped and before it was struck by the car, was a question of fact for the jury.

We also think that the question whether the defendant Kelly negligently operated the automobile was a question of fact, on which the verdict of the jury must be held conclusive, and the judgment will be affirmed.

JUDGMENT AFFIRMED.

The report was made by the following persons:

Mr. J. H. ...  
Mr. ...  
Mr. ...  
Mr. ...  
Mr. ...  
Mr. ...  
Mr. ...  
Mr. ...  
Mr. ...  
Mr. ...

[illegible]

HARRY FOSTER DEAN,  
Defendant in Error,

vs.

CHICAGO AND NORTHWESTERN RAILWAY  
COMPANY, a corporation,  
Plaintiff in Error.

ERROR TO MUNICIPAL COURT  
OF CHICAGO.

183 I.A. 317

MR. PRESIDING JUSTICE BAKER

DELIVERED THE OPINION OF THE COURT.

In an action for the violation of the Civil Rights Act of this State, tried by the court, plaintiff Dean had judgment for \$300, to reverse which the defendant railway company prosecutes this writ of error. From the evidence the court might properly find that plaintiff, a negro and a citizen of Illinois, wished to see the president of the railway company on business of the company; that he went to the station of the company on Madison street and was informed that the president's office was on the top floor of the building; that the elevators to the first and second floors of the building were open to passengers taking or leaving trains; that on the floors above the second were only certain offices of the defendant and of the Pullman company and such floors were open only for the use of the occupants and persons having business with them; that plaintiff entered an elevator car and was carried to the fourth floor, where he left the elevator and looked for the office of the president; that he was informed that the president's office was in another building and went back to the elevator and entered a car that was going down; that the man in charge of the car asked him where he was going and who he worked for and he answered that he was going down; that the man replied, "You will not go down in this elevator", and said to three men who had just entered the car, "Gentlemen,

718 A 7287

take the other elevator", and said to plaintiff, "You get out of here", and further said that he had instructions from the defendant company and the Pullman company not to carry any colored people in his elevator; that he took hold of plaintiff and said "Get out"; that in answer to a question of plaintiff the man said, "I won't take you down"; that plaintiff walked down stairs and the three other men were taken down in the elevator.

The Act provides that all persons in this State, "shall be entitled to the full and equal enjoyment of the accommodations, etc." of, among other things, "elevators", subject only to conditions and limitations applicable alike to all citizens. The defendant carried the plaintiff from the second floor, where persons going to a train left the elevator, to the fourth floor without objection or inquiry as to his business. It was the duty of the company to take him to the upper floors if he had business to transact with an officer of the defendant, and the fact that he was mistaken in believing that the office of the president was on the fourth floor did not make it improper for him to go up on the elevator to the floor where he believed the office of the president was. Having been taken up under such circumstances, he was entitled to ride down in the elevator and from all the evidence the court might, we think, properly find that the plaintiff was refused the privilege of riding down on the elevator for the sole reason that he was a colored man, and that such refusal was an act done within the scope of the employment of the elevator man and was a violation of the Civil Rights Act.

The Act vests in the court the power to fix, within the limits stated in the Act, the amount the defendant shall pay to the plaintiff in case of a violation of the provisions of the Act, and we cannot say that the amount awarded in this case was excessive.

Finding no error in the record, the judgment is affirmed  
AFFIRMED.





March Term, 1912, No.

247 - 18286

In the Matter of the Petition  
of PATRICK McCARTHY, insolvent  
debtor, arrested at the suit  
of ANDREW WYDRA, on Appeal of  
PATRICK McCARTHY.

Appellant,

vs.

PEOPLE OF THE STATE OF ILLINOIS,  
Appellee.

APPEAL FROM COUNTY COURT

OF COOK COUNTY.

183 I.A. 321

MR. PRESIDING JUSTICE BAKER

DELIVERED THE OPINION OF THE COURT.

There is in the record in this case no bill of exceptions. All that is shown by the record is that appellant Mc Carthy filed in the County Court his petition to be released from the custody of the sheriff who held him on a ca sa issued on a judgment recovered against him in the Municipal Court for \$450 by Andrew Wydra; that after many continuances the court denied the prayer of the petition, remanded petitioner to the custody of the sheriff, dismissed the petition and the petitioner prayed, was allowed and perfected his appeal to this court. On such a record, with nothing to show the nature of the action in the Municipal Court, we cannot say that the County Court erred in holding that malice was of the gist of the action or in dismissing the petition, and the judgment of the County Court will be affirmed.

AFFIRMED.



253 - 18292

March Term, 1912, No.

A. YUCKMAN,  
Defendant in Error,

vs.

JOSEPH A. FISCHER,  
Plaintiff in Error.

)  
) ERROR TO MUNICIPAL COURT  
)  
) OF CHICAGO.  
)

183 I.A. 322

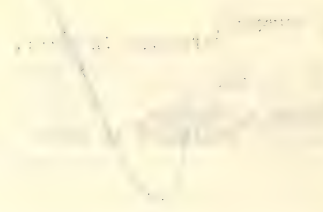
Plaintiff Yuckman was a real estate broker in Chicago, defendant Fischer owned two pieces of real estate clear of incumbrance and valued by him at \$23,000, and Wolbach owned a property containing 12 flats mortgaged for \$23,000. The contention of plaintiff is that acting for both parties he negotiated a verbal agreement between defendant and Wolbach for the exchange of said properties on a basis of \$24,000 for defendant's property and \$23,000 for the equity in Wolbach's property, which was mortgaged for \$23,000; that he told defendant that he would charge him 2 1/2 per cent. on \$23,000 and charge Wolbach 2 1/2 per cent. on \$46,000; that Wolbach was ready and willing to carry out the verbal contract, but defendant refused to do so. In an action in the Municipal Court against the defendant for his commissions plaintiff had a verdict for \$575 and judgment thereon, to reverse which defendant prosecutes this writ of error.

MR. PRESIDING JUSTICE BAKER

DELIVERED THE OPINION OF THE COURT.

The conclusion reached by us renders it unnecessary to consider any question other than the question whether the verdict is so manifestly against the evidence that the Court erred in denying defendant's motion for a new trial.

# STATE OF NEW YORK



IN SENATE,  
January 1, 1900.

REPORT  
OF THE  
COMMISSIONER OF THE LAND OFFICE,  
IN RESPONSE TO A RESOLUTION  
PASSED BY THE SENATE  
MAY 1, 1899.

ALBANY:  
J. B. LEECH, STATE PRINTER,  
1900.

ALBANY, N. Y.,  
JANUARY 1, 1900.

TO THE SENATE,  
BY THE COMMISSIONER OF THE LAND OFFICE.



The negotiations began in March and were continued until May 8, 1911. The principals never met and the negotiations were conducted by plaintiff. In his testimony when he states that was said to him by one of the principals, it is not always easy to determine whether he refers to defendant or to Wolbach. For example, he testified that, "Mr. Fincher said, 'I have considered the matter and if he would accept \$46,000 and take mine at \$23,000 I would consider it.' And I worked from the first part of March until May the 6th trying to make that deal. Mr. Lederer: Q. What do you mean? A. He told me he would take \$23,000 for his equity in that Prairie avenue property which has a mortgage on it for \$23,000." \* \* \* "So therefore he says, 'I will take this. I will accept the offer on this one at \$23,000 and will assume the mortgage for \$23,000.'" According to the testimony all the statements set forth above were made by defendant, but the Prairie avenue property was Wolbach's property and it was for him to say what he would take for it. In the last sentence, according to the testimony, defendant said that he would accept the offer of \$23,000 and assume the mortgage of \$23,000. This is consistent only with the theory that the agreement was made by the acceptance by defendant of an offer by Wolbach, but in other parts of his testimony plaintiff states that it was made by the acceptance by Wolbach of an offer of defendant. Plaintiff further testified that the conversation with defendant above referred to occurred about May 1st or 2nd. He did not testify that he saw Wolbach between May 2 and May 6, and testified that Saturday, May 6, he called up defendant and told him his offer was accepted and called up Wolbach and said that he expected to be at his office that afternoon to close the deal; that he then called up defendant, who asked that the matter be postponed; that he arranged with Wolbach to meet him



Monday morning, notified defendant and arranged to go to his house at that time and take him to Wolbach's office; that he went to defendant's house at the time agreed on, but was unable to find defendant.

Wolbach, called by the plaintiff, testified in chief that the last offer plaintiff made him was \$22,000; that plaintiff said, "I cannot get you \$22,000 or those two properties clear"; that he told plaintiff he would not make the deal unless he got \$23,000 "or those two properties clear." He further testified that plaintiff said he would let him know whether he could get \$46,000 or not; that shortly afterwards plaintiff called him up and said that, "Mr. Fischer has agreed to make your deal."

Defendant testified that plaintiff asked \$49,000 for the Wolbach property (from which was to be deducted the mortgage of \$23,000), and in April came down to \$46,000 and said he would take defendant's property at \$23,000; that plaintiff asked defendant to come to his office Saturday, May 6, and defendant said that he wanted to make another visit to the building and the meeting was postponed until Monday; that Sunday he found the condition of the building unsatisfactory, did not meet plaintiff Monday and the next day told him that he would not take the building on account of the condition of the workmanship and material. He further testified that he had no conversation with plaintiff about paying him a commission or about his getting a commission from Wolbach.

It is not disputed that the value placed by defendant on his property was at all times \$23,000. This was the amount of the mortgage on Wolbach's property, so that an even exchange of defendant's property for Wolbach's equity could only be made on a basis of a value of \$46,000 for Wolbach's property. To entitle plaintiff to a verdict he was bound to prove by a preponderance



of the evidence that defendant was willing to make an even exchange of his property for the equity in Wolbach's. The only evidence tending to show that defendant was willing to make such an exchange was the testimony of plaintiff that about May 1st or 2nd the defendant said that he would accept the offer of \$23,000 for his property, take Wolbach's at \$46,000 and assume the mortgage of \$23,000. He did not testify that Wolbach had made any such offer as he testified defendant said he would accept.

The testimony of the plaintiff is directly contradicted by the defendant, who testified that he neither made nor accepted an offer to exchange on the basis stated by plaintiff. Plaintiff was also contradicted by Wolbach, who testified that plaintiff said he could get witness \$22,000; that he told plaintiff he would not make a deal unless he got \$23,000 or those two properties clear. "Q. That was at the price of how much? A. \$46,000. Q. What was the next thing you heard? A. An appointment was made to close the deal." If plaintiff had had an offer from the defendant to put in his property at \$23,000 and take Wolbach's at \$46,000 and assume the mortgage, he would have communicated such offer to Wolbach in place of proposing an exchange on a basis of \$45,000 for Wolbach's property.

We think that the verdict in this case is so clearly against the evidence that the trial court erred in denying defendant's motion for a new trial, and the judgment will therefore be reversed and the cause remanded.

REVERSED AND REMANDED.





231 - 18270  
March Term, 1912, Mo.

NATHAN KANTER,  
Defendant in Error,

vs.

ABRAHAM FINKELSTEIN,  
Plaintiff in Error.

ERROR TO THE MUNICIPAL COURT  
OF CHICAGO.

183 I.A. 348

MR. JUSTICE BROWN DELIVERED THE OPINION OF THE COURT.

The only question in this case is one of fact. It is whether a sale of the stock and fixtures of a cigar store by the plaintiff was made to the defendant or to the defendant's son, a minor.

We see no reason to question the decision of the trial Judge, who found it was to the defendant.

Nor do we find sufficient cause in the affidavit of newly discovered evidence to hold the refusal to vacate the judgment erroneous.

The judgment of the Municipal Court is affirmed.

AFFIRMED.



A. R. FIFER, doing business  
as A. R. Fifer & Co.,  
Defendant in Error,

vs.

HYMAN LEWIS and LOUIS REDMAN,  
Plaintiffs in Error.

)  
)  
) ERROR TO THE MUNICIPAL COURT  
)  
) OF CHICAGO.  
)

183 I.A. 349

MR. JUSTICE BROWN DELIVERED THE OPINION OF THE COURT.

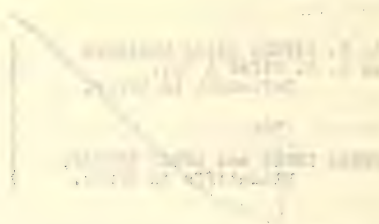
The plaintiffs in error in this cause, Hyman Lewis and Louis Redman, seek by this writ of error to reverse a judgment of \$500 and costs against them rendered by the Municipal Court of Chicago January 23, 1912, in favor of Abraham R. Fifer, the plaintiff below and the defendant in error here. The cause was tried below before the court without a jury.

The plaintiff Fifer was a licensed broker of the City of Chicago during 1911, in which year the alleged cause of action arose. During that year the defendants Lewis and Redman approached an employe of the plaintiff Fifer, a Mr. DeKolsky, and desired him to sell some real estate known as 1448 North Tolman avenue in Chicago. The price for which the property was offered by the defendants was twelve thousand dollars net. According to their own evidence they said that if the plaintiff could sell it for \$12,500 they would pay commissions, and if for \$12,000 the purchaser must pay commissions. The defendants, that is, wanted \$12,000 net for the property.

The plaintiff, acting through his employe DeKolsky, found would-be purchasers, one Loeffler and one Kallisen, and negotiated with them for a purchase of the property by them. The matter went so far that he procured the examination of the property by them and their wives and that they at first offered \$11,500 for it and then raised the offer to \$12,000, but refused

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The statistics in this report are based on a sample of 1000 households, selected at random from the population of the United States. The results are presented in the following tables. The first table shows the distribution of income among the households. The second table shows the distribution of expenditures among the households. The third table shows the distribution of assets among the households. The fourth table shows the distribution of liabilities among the households. The fifth table shows the distribution of net worth among the households. The sixth table shows the distribution of income per capita among the households. The seventh table shows the distribution of expenditures per capita among the households. The eighth table shows the distribution of assets per capita among the households. The ninth table shows the distribution of liabilities per capita among the households. The tenth table shows the distribution of net worth per capita among the households. The data in these tables are based on the results of a survey conducted by the Bureau of Economic Warfare, Department of War, in 1945.



to pay anything additional to this sum for commissions. Kallison and Loeffler gave \$200 to DeKalfsky as a deposit with the plaintiff on the purchase. DeKalfsky got the plaintiff and the defendants together and prepared a contract for the sale and purchase of the property and tried to get the defendants to sign it. When, however, it was stated that a broker's commission would not be paid by the purchasers and must be paid by the defendants, the defendants refused to sign the contract and the \$200 deposit was returned by the plaintiff to Loeffler and Kallison. Up to this point, of course, the defendants, so far as the record shows, were acting within their right and no liability had accrued from them to the plaintiff. But when Loeffler and Kallison were looking at the property, Kallison left his address with the wife of one of the defendants and a day or two after the refusal of the defendants to sign the contract DeKalfsky had prepared, defendant Redman called on Kallison and told him that he could buy the property for the price he had offered, namely, \$12,000, but that he should make the contract in some one else's name and take an assignment thereof, by which device, it was explained, the defendants would not be obliged to pay commissions. This arrangement was carried out. A contract similar to the one the defendants had before refused to sign was executed to one Rogoff, who immediately assigned it to Loeffler and Kallison and they and their wives received a deed in pursuance of it about two weeks later. The purchase price paid was \$12,000, although the deed expressed a consideration of \$12,500.

By seeking and availing themselves of the benefit of the results of the broker's labors, the defendants rendered themselves liable for brokerage fees or commissions to him. Wilson v. Mason, 158 Ill., 304; Close v. Brown, 230 Ill. 238.

So far as there were any controverted questions of fact in the case which would modify the above statement, the



court, trying the case without a jury, decided them in favor of the plaintiff and correctly, as we think the record shows.

There is no merit in the contention that Redman was not the owner of an interest in the property in question, and therefore should not be held liable. The evidence shows that he was the real owner of the interest which stood in the name of Dora Goldberg, who signed the contract and deed. Redman himself arranged the sale and originally employed the broker of whose services he afterwards took advantage.

The judgment of the Municipal Court is affirmed.

AFFIRMED.



March Term, 1912, No. 7

203 - 18239

EQUITABLE TRUST CO. OF NEW  
YORK, a corporation,  
Plaintiff in Error,  
  
vs.  
  
LOUIS M. COHN,  
Defendant in Error.

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ERROR TO THE MUNICIPAL COURT  
  
OF CHICAGO.

183 I.A. 383

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

The plaintiff, here the plaintiff in error, brought a suit of the fourth class in the Municipal Court of Chicago against the defendant to recover on the following instrument:

"Chicago, Ills., Dec. 30th, 1902.

Mr. Archibald C. Haynes,  
General Agent,  
The Equitable Life Assurance Society,  
#25 Broad St., N. Y.

Dear Sir:-

I hereby acknowledge having received from Mr. Geo. Schlesinger policy No. 1180045 - being for \$10,000.00 on my life, in the Equitable Life Assurance Society. You are authorized and requested to place the said policy in force from this date, and I promise to pay the balance of the first annual premium amounting to \$300.00 as follows:

April 15th, 1903,.....	\$150.00
Aug. 15th, 1903,.....	\$150.00
	<u>\$300.00.</u>

Very truly yours,  
Louis M. Cohn.

(Said instrument being endorsed on back thereof as follows):  
'Archibald C. Haynes,  
Gen'l Agt.  
By E. W. Jones,  
Atty.'"

The cause was submitted to the court, who found for the defendant and entered judgment on the finding.

The case is controlled by the decision in The Equitable Trust Co. v. Harper, 258 Ill. 615, where it was held the same party as plaintiff could not recover on a similar writing, under similar circumstances.

The judgment is affirmed.

AFFIRMED .



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241 - 18280

JOHN NEDVED and MERI NEDVED,  
Defendants in Error,

vs.

COURT OF HONOR, a corporation,  
Plaintiff in Error.

ERROR TO MUNICIPAL COURT  
OF CHICAGO.

183 I.A. 390

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

The plaintiffs, here the defendants in error, brought a suit against the defendant, here the plaintiff in error, in the Municipal Court of Chicago, to recover as beneficiaries on a certificate of membership issued June 19, 1909, to their daughter, Rose Nedved, by the defendant, a fraternal beneficiary society organized and doing business under the laws of this State. The jury found the issues for the plaintiffs and assessed their damages at the sum of one thousand dollars and the court entered judgment on the verdict.

In the application of the said Rose Nedved, under date of June 1, 1909, for membership in Class D, she stated, inter alia, that she was twenty-three years of age, single, and resided at 1321 Spaulding avenue, and included therein the statement to the defendant's medical examiner, and all made a part of and included in the certificate of membership, in part as follows:

"How many brothers living? 2. Ages 25 and 12.  
Health good.  
How many brothers dead? None.  
How many sisters living? 2. Ages 18 and 15.  
Health good.

How many sisters dead? 1. Age at death? 22 years.  
Cause of death? Gastric Catarrh.  
If other than first class give particulars and state whether tuberculosis is or was a factor.

3. Have either of your parents or any of your paternal or maternal relations had consumption, if so state kind, degree, duration and effects on health? Answer must be complete and definite? No.

6. Have you lived in the family with or nursed anyone who was afflicted with or died of consumption? No.

30. Is there anything to your knowledge, in your



physical condition or personal history or habits tending to shorten your life which is not distinctly set forth above? No.

\* \* \* \*

I hereby adopt as my own the foregoing answers and statements, whether written by me or not, and declare and warrant that they are full, complete and true, and I agree that the truth of each answer and statement mentioned above shall be a condition precedent to any binding contract issued upon the faith of the foregoing answers, and that I have not concealed or omitted to state any facts regarding my health, either past or present.

I further agree that the foregoing answers and statements, together with the preceding declaration shall form the basis of the contract between the Court of Honor and myself, and shall constitute warranties and are offered by me as a consideration for the contract applied for and are hereby made a part of any benefit certificate that may be issued upon this application, and shall be deemed and taken as part of such certificate; that this application may be referred to in said benefit certificate as the basis thereof, and that they shall be construed together as part of my contract; and I further agree that if any answer or statement in this application is not true and complete, or if I shall fail to comply with, and to conform to any or all of the laws of said Court of Honor, now in force or that may hereafter be enacted, amended or adopted, that my benefit certificate shall be void."

The insured died October 25, 1910, after an illness of five or six days, with pneumonia.

The evidence is undisputed that the decedent at the time of making said application lived with her parents, the beneficiaries, at the address given on Spaulding avenue; that in November, 1908, her sister Mary died there with consumption and at that time the family consisted of the parents and decedent with four other children, all residing at said place; that at the time of the application other sisters and also a brother were dead besides Mary, the one who died of consumption. That the answers to the said questions in the application heretofore quoted in respect to the above matters were false is not disputed.

The right of the plaintiffs to maintain a joint action is not raised and therefore we shall not consider same.

The plaintiffs claim that where an application for a policy of insurance contains an incomplete answer to a material





question and the company does not call for a further answer, but issues its policy, the imperfection is waived. There is no evidence of any kind in this record that shows the said answers were incomplete; and the imaginary circumstances suggested by counsel cannot be indulged to make uncertain that which is on the record plain and certain.

It is also contended that the said statements of the decedent in the application were neither warranties nor material representations such as to avoid the policy. With this we can not agree. If not warranties they were certainly material representations. *Metropolitan Life Insurance Co. v. Moravec*, 214 Ill. 186; *Minnesota Life Insurance Co. v. Link*, 230 Ill. 273; *Spence v. Central Accident Ins. Co.*, 236 Ill. 444; *Continental Mutual Life Ins. Co. v. Young*, 77 Ill. App. 440; 1 May on Insurance, Sec. 185.

The defendant had in its employ one whose duty it was to investigate and discover, if he could, incorrect and false statements of applicants and make recommendations pertaining thereto. This is a commendable course, but we are unable to see how it can avail the plaintiffs in the absence of any proof that he obtained knowledge of the decedent's false statements; and that the said answers made by the decedent to secure a certificate of membership in the defendant society were intentionally and knowingly false is, on the record, beyond controversy.

The other points, in relation to the abstract of the record and the instructions, made by the plaintiffs in an effort to sustain the judgment, are untenable and require no discussion. The representations being false, and being either warranties or material representations, in either event rendered the certificate of membership as to insurance void under the authorities above cited.

The judgment is reversed.

REVERSED.



March Term, 1912, No.

248 - 18287

EDWARD HINES LUMBER COMPANY,  
a corporation,  
Appellant,

vs.

JOHN J. O'HERON et al.,  
Appellees.

)  
)  
) APPEAL FROM SUPERIOR COURT  
)  
) OF COOK COUNTY.  
)

1831.A. 391

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

The appellant filed a bill against the appellee in the Superior Court to establish and enforce a mechanic's lien for lumber furnished by appellant, as a sub-contractor, to F. E. Brown & Co., contractor, used exclusively by it in the construction of moulds and forms, which said moulds and forms were used in the building of foundation walls in the erection of a certain building; and after the concrete had hardened sufficiently said lumber was removed and none of it became a part of the said building. The Chancellor found that the appellant was not entitled to a mechanic's lien, and dismissed the bill for want of equity, from which decree this appeal is prosecuted.

The case is controlled by the decision in Rittenhouse & Embree Co. v. F. E. Brown & Co., 254 Ill., 549, where the court held, under similar circumstances, that there could be no mechanic's lien.

The decree is affirmed.

AFFIRMED.

106. A. 1885

March Term, 1912, No.

4 - 17251

March Term, 1912, No.

JOSEPH M. LAUGHLIN,  
Defendant in Error,

vs.

WILLIAM M. HOPKINSON,  
Plaintiff in Error.

)  
)  
) ERROR TO THE CIRCUIT COURT  
)  
) OF COOK COUNTY.  
)

183 I.A. 401

MR. JUSTICE BROWN DELIVERED THE OPINION OF THE COURT.

We are of opinion that the judgment attacked by this writ of error must be reversed independently of all other considerations because of the excessiveness of the verdict - an excessiveness in our opinion so great after a careful study of the record as to show passion and prejudice on the part of the jury which cannot be cured by remittitur.

We appreciate all that is said by the counsel for defendant in error about the disadvantages of delay in litigation, but this is a case where the argument from inconvenience cannot be given sufficient strength to sustain the verdict. A new trial should have been granted in the court below and the judgment must be reversed and the cause remanded to that court for such a trial. This renders not only superfluous, but, according to our rule adopted for obvious reasons, inexpedient a discussion of the relative weight of the evidence. Upon that another jury will decide. Nor do we pass on all the questions of law raised by the plaintiff in error. It is not necessary for the guidance of the court below on a new trial because the <sup>rulings</sup> are not generally, even if errors, those which will be repeated in another trial. Nor are we disposed to pass on the abstract proposition that a judgment including punitive damages in a proper case must be reversed because the jury in giving them disregarded an instruction concerning the measure of damages which said nothing



1. The first group of people who are not in the labor force are those who are not in the labor force for any reason. This group is the largest and includes people who are not in the labor force for any reason.

about punitive damages.

If the case is again tried undoubtedly the question of punitive damages will be dealt with in the instructions by the trial court. The judgment in this case is reversed by us because we deem it palpably excessive, whether or not punitive damages could be properly given.

The only error complained of in the admission of evidence we deem it necessary to note is that of the admission of the transactions concerning the sale of the store at Oil City. Neither the letter of Hopkinson to Drohen of February 15, 1908, nor any other evidence relating to the sale of the store at Oil City to Olney is deemed by this court relevant or material. It was res inter alios, and not justified, as defendant in error argues, to show fraudulent intention in the matter under investigation in the case at bar.

The judgment is reversed and the cause remanded to the Circuit Court.

REVERSED AND REMANDED.

THE UNITED STATES OF AMERICA

TO THE HONORABLE SENATE OF THE UNITED STATES  
IN SENATE, JANUARY 10, 1900.  
REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE  
ON THE LANDS BELONGING TO THE UNITED STATES  
AND THE LANDS BELONGING TO THE SEVERAL STATES

The following report was submitted to the Senate on the 10th day of January, 1900, by the Commissioner of the General Land Office, in compliance with a resolution of the Senate, passed on the 10th day of January, 1899, relating to the lands belonging to the United States and the lands belonging to the several States.

The report contains a statement of the lands belonging to the United States and the lands belonging to the several States, and a statement of the lands belonging to the United States and the lands belonging to the several States, and a statement of the lands belonging to the United States and the lands belonging to the several States.

The report also contains a statement of the lands belonging to the United States and the lands belonging to the several States, and a statement of the lands belonging to the United States and the lands belonging to the several States.

COMMISSIONER OF THE GENERAL LAND OFFICE

WASHINGTON, D. C.

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180 - 18181.

OAK PARK TRUST AND SAVINGS BANK,  
a corporation, MIRIAM COOMBS, individ-  
ually, and MIRIAM COOMBS, as trustee,  
Defendants in Error,

vs.

JOHN A. MURPHEY, Jr., Emily C. Murphey,  
and H. FAULCONER JELL,  
PLAINTIFFS IN ERROR.

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

183 I.A. 402

MR. JUSTICE ROOME DELIVERED THE OPINION OF THE COURT.

This writ of error sued out of this court on December 21, 1911, by John A. Murphey, Jr., and Emily C. Murphey, is prosecuted to review the record of a foreclosure proceeding in the Circuit Court, wherein a decree of foreclosure was entered on November 23, 1908, and an order confirming the master's report of a sale made in pursuance to said decree, was entered on December 24, 1908. H. Faulconer Jell, a defendant in said foreclosure proceeding, and upon whom constructive service only was had by publication, filed his motion in the Circuit Court on December 16, 1911, for leave to answer the original bill of foreclosure, which motion was denied by the court on February 20, 1912. On March 29, 1912, leave was granted said Jell to join in error as a plaintiff in error in this proceeding.

There are several wholly sufficient grounds upon which the decree of the Circuit Court must be affirmed. First. The purported abstract of the record filed by plaintiffs in error does not comply with Rule 13 of this court. It is an index merely and not an abstract of the record, such as is required to present for review the errors assigned and argued.

Second. The decree of foreclosure which was entered on November 23, 1908, is a final decree (Kirby v. Wards,

304-41625



140 Ill., 289,) to review which a writ of error could not be brought by plaintiffs in error, John A. Murphey, Jr., and Emily C. Murphey, after the expiration of three years from the rendition thereof, - that is, from the date of its entry. R. S. 1911, Chap. 110, Sec. 117. This writ of error was brought December 21, 1911, more than three years after the rendition of said decree. Errors assigned affecting the order of the Circuit Court entered December 24, 1908, confirming the master's report of the sale under the decrees of November 23, 1908, are not argued and are, therefore, waived.

Third. The right of plaintiff in error, Jell, to question the propriety of the decree of November 23, 1908, by motion in the Circuit Court, must have been exercised by him within three years after the entry of said decree. R. S. 1911, Chap. 33, Sec. 19. The motion whereby he attempted to ~~avoid~~ himself of such right was not filed until December 18, 1911, - more than three years after the entry of said decree - and was not presented in apt time. Furthermore, error assigned upon the order of February 20, 1912, denying said motion, cannot be considered, because this writ of error issued out December 21, 1911, does not bring before us for review an order entered subsequent thereto. CITY OF CHICAGO v. Myers, 158 Ill. App., 835; Murphy v. Olson, 211 Ill., 150.

Notwithstanding the state of the record, we have considered the questions raised upon the merits of the controversy and are impelled to hold that the errors assigned are untenable.

The decrees of the Circuit Court is affirmed.

DECREE AFFIRMED.



83A 453

335

# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon on the Fourth Tuesday in the month of March in the year of our LORD, one thousand nine hundred and thirteen, the same being the 25th day of March, in the year of our LORD, one thousand nine hundred and thirteen.

Present:

Hon. JAMES C. McBRIDE, Presiding Justice.

Hon. OWEN P. THOMPSON, Justice.

Hon. HARRY HIGBEE, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff.

And afterwards in Vacation, after said March Term, to-wit: On the 20th day of October, A. D. 1913, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Haebert  
adm

vs.

No. 21

March Term, 1913.

Loor R R

183 I.A. 483

~~ERROR TO~~  
APPEAL FROM

City

COURT

Efflonis

COUNTY

TRIAL JUDGE

Hon. W. M. Vandiver



March Term, A. D. 1913.

Wm. U. Halbert, Administrator of  
the estate of John Scadman, De-  
ceased,

Appellee,

vs.

Louisville & Nashville Railroad  
Company,

Appellant.

Appeal from the  
City Court of  
East St. Louis.

183 I.A. 483

McBride, F. J.

The defendant prosecutes this appeal to reverse a judgment which the plaintiff recovered against it in the city court of East St. Louis for \$2,500.00.

On December 18, 1911, the defendant at about the hour of 5:40 P.M. started its McLeansboro accommodation train from the Relay depot in East St. Louis to McLeansboro. There is a curve to the north east in defendant's tracks extending from the Relay depot across seventh and eighth streets in the city of East St. Louis and defendant's train was moving out on the south bound track to the northeast and when it arrived at or near seventh street it struck the deceased, John Scadman, and injured him so badly that he died shortly thereafter.

It appears from the evidence that John Scadman and Louis Rungaila went to the home of Mrs. Yocis, located on Seventh Street and close to the place where defendant's railroad crosses this street. They were there visiting a man by the name of Zinc. The deceased left the residence of Mrs. Yocis about fifteen minutes before six, in company with Zinc and Rungaila, and appellee claims that as they were passing down Seventh Street and in the act of crossing the tracks of the defendant that the train of defendant, above mentioned, ran over Zinc and Scadman and killed them and claims that they were killed upon the crossing and that the engineer failed to give any alarm by ringing the bell or sounding the whistle and that the gateman failed to lower the gates at the



Exhibit 10, 11

Page 10, 11

Exhibit 10, 11

Appointed from the  
City Court of  
St. Louis, Mo.

U. Halbert, Administrator of  
the estate of John Bowman, De-  
ceased,  
vs.  
Louisville & Nashville Railroad  
Company,  
Appellant.

1831.A.483

Schmidt, J. L.

The defendant presented this motion to postpone a trial

and when the plaintiff's motion was granted it is the duty of  
of St. Louis for \$2,500.00.

On December 18, 1911, the defendant at about the hour of  
11:40 P. M. started its McLennanboro accommodation train from the  
Navy depot in East St. Louis to McLennanboro. There is a curve  
to the north east in defendant's tracks extending from the Navy  
depot across seventh and eighth streets in the city of East St.  
Louis and defendant's train was moving out on the south bound  
track to the northeast and when it arrived at or near seventh  
street it struck the deceased, John Bowman, and injured him so  
badly that he died shortly thereafter.

It appears from the evidence that John Bowman and family  
Kumalia went to the home of Mrs. Yoris, located on Seventh Street  
and close to the place where defendant's railroad crosses this  
street. They were there visiting a man by the name of Alvin. The  
deceased left the building at East Third Street Illinois Street  
about six, in company with Alvin and Kumalia, and while Alvin  
and the two were passing down seventh street and in the act of  
crossing the tracks of the defendant that the train of defendant  
approach. The two and Bowman and Alvin were  
killed and they were killed upon the crossing and that the  
train failed to give any alarm or signal for only one whistle  
the whistle and that the deceased failed to cross the street at the

time the train past.

Appellant claims that Zinc and Scadman were attempting to cross its railroad east of the street and not at a street crossing, and were trespassers at the time they were killed. It also insists that it rang the bell and blew the whistle and lowered the gates as the train approached the street crossing, and was not running at an excessive rate of speed. There was much dispute in the testimony as to the place and circumstances under which Scadman was killed. It further appears from the evidence that Scadman left surviving him Margaret Scadman, his mother, and Katherine Silke his sister, who reside at the village of Luloyazi, County of Shavely, State of Kovono-Russia. That the sister was married to Krischjan Silke and the mother made her home with her daughter. It further appears from the evidence that in the winter of 1910, the deceased sent his mother \$10.00. Upon the trial appellee, over the objections of appellant, introduced testimony tending to show that the deceased made remittances at different times to Krischjan Silke. This testimony was objected to by counsel for appellant on the ground that it was in the nature of hearsay testimony and did not show any payment or contribution by deceased to the support of his mother.

The declaration contains three counts. The first count charges that the defendant negligently and carelessly ran its passenger train over and across its tracks at a greater rate of speed than permitted by the ordinances, which limited the speed to ten miles per hour.

The second count charges the defendant with having negligently operated its train at a greater rate of speed without ringing the bell on its said locomotive in disregard of the requirements of the ordinances of the city of East St. Louis.

The third count charges that the defendant operated its train at a high rate of speed without ringing the bell or sounding the whistle and without lowering or closing the gates at

time the train passed.

Appellant claims that King and Goodman were standing in  
cross the railroad east of the street and not at a street cross-  
ing, and were trespassers at the time they were killed. It is  
so stated that if King the bell and blew the whistle and in-  
ed the gates as the train approached the street crossing, and  
was not running at an excessive rate of speed. There was much  
dispute in the testimony as to the place and time of the accident  
which Goodman was killed. It further appears from the evidence  
that Goodman left surviving his daughter, his mother,  
and Katherine Elise his sister, who reside at the village of  
Tolpelt; about 10 miles from the village of Tolpelt. His  
sister was married to Michael Elise and the wedding took place  
some time ago. It is further stated that the witness  
that in the winter of 1910, the deceased sent his salary \$10.00.  
Upon the trial at Tolpelt, with the following exceptions, 1910-  
about testimony being in some cases the witness was present.  
Evidence of testimony being in some cases the witness was present.  
was objected to by counsel for the defendant and the court  
was in the nature of hearsay testimony and did not admit any evi-  
dence or contribution by deceased to the support of his mother.  
The defendant claims that the witness was present.  
charges that the defendant negligently and carelessly ran the  
passenger train over and across the track at a greater rate of  
speed than permitted by the ordinances, which limited the speed  
to ten miles per hour.  
The second count charges the defendant with having neglig-  
ently operated the train at a greater rate of speed than  
ringing the bell on the said locomotive in disregard of the re-  
quirements of the ordinances of the city of East St. Louis.  
The third count charges that the defendant operated the  
train at a high rate of speed without ringing the bell or sound-  
ing the whistle and without looking or clearing the gates at

Seventh Street. To this declaration defendant filed a plea of general issue.

The appellant has assigned several errors, among them, that the court erred in admitting evidence introduced by plaintiff to show that deceased sent or furnished his mother money for her support, or that she was dependent upon him for support and that it was not proven by legitimate evidence that deceased contributed to the support of his mother.

It appears from the evidence of John Wagar that he knew John Scadman while he lived in Russia and that he knew Scadman's father, mother and sister. That his sister's name is Katherine Silke and she is now the wife of Krischjan Silke and that the mother lived with the sister; that he saw them in the winter of 1910, that at that time he made a trip to the old country and says that John Scadman gave him ten dollars and he gave it to Scadman's mother. That Scadman was about forty-eight years old and never married. Plaintiff then introduced in evidence eight exhibits, marked "A", "B", "C", "D", "E", "F", "G", "H", EACH of which purports to be receipts for \$15.80, except the first one which purported to be a receipt for \$21.00, and is as follows:

"Plaintiff's Exhibit A.

No. 188884. Place *and Date* East St. Louis, Ill., Mar. 16, 1908.  
Received of *John Scadman*  
Twenty-one ----- 00/00 Dollars  
For (Foreign Currency) Forty (40) Rubles  
To be remitted to Krischjan Szyld  
Residence *Lulaja-Legory-S sawle-Kown*  
\$21.00 (Signature) Tad. Chwalibog.

(Attached)

5714 BANK MONEY ORDER R.P.

No. 188884. for Rub. 40  
was mailed to Kristian Szyld, Lulajsz

By . Wil. Der Regaer Commerabank .  
I IV 1908 Libau .

RENAUTH, NACHEOD & KUHNE.

Auftraggeber: Thad. Chwalibog, East St. Louis, Ill."

The other receipts are in substance the same. A witness by the name of Thaddius Chwalibog was then introduced by the



Seventh Street. To this decision defendant filed a plea of  
(Record) 10000.

The appellant has assigned several errors, among them, that the court erred in admitting evidence introduced by defendant to show that defendant was in possession of the stolen goods at the time of the arrest, or that she was dependent upon him for support, and that it was not proven by legitimate evidence that defendant was attributed to the support of his mother.

It appears from the evidence of John Goshorn that he knew John Goshorn while he lived in Russia and that he knew Goshorn's father, mother and sister. That his sister's name is Catherine Slike and she is now the wife of Kristian Slike and that the mother lived with the sister; that he was born in the winter of 1910, that at that time he made a trip to the old country and says that John Goshorn gave him ten dollars and he gave it to his mother. That Goshorn was about twenty-two years old and never married. Plaintiff then introduced in evidence eight exhibits, marked "A", "B", "C", "D", "E", "F", "G", and "H", each of which purports to be receipts for \$10.00, except the first one which purports to be a receipt for \$20.00, and in so

Plaintiff's Exhibit A  
No. 188884. Place  
and date of issue, 111, Nov. 12, 1930.  
Received Kristian Slike  
Twenty-one dollars  
for (Foreign Currency) forty (40) Rubles  
To be remitted to Kristian Slike  
Residence 1414-1415 N. Main Street  
121.00  
(Witnessed) Two Witnesses  
(Attested)  
BANK OF NEW YORK  
For Cash  
No. 188884.  
was mailed to Kristian Slike, 1414-1415  
N. Main Street, New York City, N. Y.  
I V 1930  
NORTH, BROWN & WHITE  
New York City, N. Y.

The other receipts are in substance the same. A witness



plaintiff to prove the payment of the money, represented by these receipts, to the mother. His testimony was that John Scadman paid him the money mentioned in the receipts at East St. Louis; that the witness then sent the money to some bankers in New York where it was sent to Krischjan Silke and on cross examination, in explanation of the mode of transmitting this money this witness says: "John Scadman paid me the money mentioned in the receipt marked plaintiff's Exhibit "A". . . Didn't know him before that time. I sent the money to Kanuth, Nachod & Kuhne, Bankers in New York. Don't know them personally. This receipt that is attached is from New York. After one month when the people get the money I get a receipt from Kanuth, Nachod & Kuhne. I didn't get this receipt from Russia. I don't know what Kanuth, Nachod & Kuhne did with the money." It is also true that Rungala stated that the deceased told him that he was going to send some money to the old country to his mother and that he did not know whether he sent it or not; and there was the further testimony of one or two other witnesses along the same line, of declarations of deceased tending to show that he was going to send some money to his mother. From a careful examination of this evidence we are clearly of the opinion that it is all hearsay, except the statement of John Wagar who said he gave the mother the ten dollars that the deceased sent her. It does not appear, however, that the mother was dependent upon deceased for her support either in whole or in part. The exhibits offered in evidence by the plaintiff were clearly incompetent; they did not prove or even purport to prove that this money was paid to the mother of the deceased but they show that it was paid to the son-in-law, and it does not appear that they were even paid to him for the purpose of assisting in the maintaining of the mother or anything of that character. There is no claim, from this evidence, that the money contained in these

plaintiff to prove the payment of the money, represented by  
 money receipts, to the mother. His testimony was that John  
 Schuman paid him the money contained in the receipt of \$100.00  
 and that the witness then sent the money to the mother. The  
 fact that it was sent to the mother is not in dispute.  
 In explanation of the mode of procuring the  
 of this witness says: "John Schuman paid me the money contained  
 in the receipt marked plaintiff's receipt 'A'. I didn't know him  
 before that time. I sent the money to the mother, Richard A. Schuman,  
 Schuman in New York. I don't know when he received it, but I  
 the people get the money I got a receipt from Richard, Richard A.  
 Schuman. I didn't get this receipt from Richard. I don't know  
 what Richard, Richard A. Schuman did with the money. It is his  
 fact that Schuman stated that the deceased told him that he was  
 going to send some money to the old country to his mother and  
 that he did not know whether or not it was sent, but that was  
 the father's testimony, of one of the other witnesses, and the  
 same line, of declarations of deceased tending to show that he  
 was going to send some money to his mother. From a careful ex-  
 amination of this evidence we are clearly of the opinion that it  
 is all correct, except the statement of John Schuman that he  
 gave the money to his mother and that the deceased told him it  
 does not appear, however, that the mother was dependent upon  
 deceased for her support either in whole or in part. The evi-  
 dence offered in evidence by the plaintiff were clearly in-  
 sufficient; they did not prove or even tend to prove that the  
 money was paid to the mother of the deceased but they show that  
 it was paid to the mother, and it is not shown that the  
 were even paid to him for the purpose of assisting in the main-  
 taining of himself or any part of that character. There is  
 no claim, from this evidence, that the money contained in the

receipts was ever intended or expected to go beyond the hands of the brother-in-law of the deceased, and for aught that appears from this testimony it may have been in payment of a debt or been received by the brother-in-law as a credit to the deceased. We are also of the opinion that the receipts offered in evidence did not even show a payment of this money to the brother-in-law. Testimony based upon hearsay statements is improper. C. & A. vs. Jennings-- 217 Ill., 494; Haldeman vs. Schuh--109 App., 259.

There can be no reasonable excuse for seeking to prove the fact, if it is a fact, that the deceased John Seadman contributed to the support of his mother by incompetent and hearsay testimony, as it is a matter capable of direct and positive proof if such conditions existed. It was averred in plaintiff's declaration that the deceased contributed to the support of his mother during his life time. This was a material averment and should have been proven by competent testimony. The amount of damages allowed depends entirely upon the pecuniary loss sustained. "The pecuniary loss, taking into view all the circumstances, must be kept in view as the only proper basis of the verdict." Chicago & Northwestern R. R. vs. Swett--45 Ill., 205.

The evidence in this case shows that the deceased was forty-eight years old; that the mother was not living with him but was living with a daughter, and in order that the mother might obtain damages, beyond mere nominal damages, it was necessary to show pecuniary interest in the continuance of the life of the deceased. In a review of the authorities in the case of Rhoads vs. C. & A.R. R. 227 Ill., 334, the Supreme Court says, "The first case decided by this court that has any bearing on the case here under discussion is City of Chicago vs. Major, 18 Ill., 349. It was there held that damages under the act can only be for pecuniary loss, and not for bereavement; that such action is for those that have a more or less direct pecuniary interest in the continuance

receipts was ever intended or expected to be paid and the basis  
of the brother-in-law of the deceased, and for which there was  
proof from this testimony it may have been in payment of a debt  
or loan received by the brother-in-law as a result of the  
ceased. We are also of the opinion that the receipts offered in  
evidence did not even show a payment of this money to the brother-  
in-law. Testimony based upon hearsay statements is improper.  
C. A. v. [illegible] 111 Ill. 2d [illegible] 199.  
App. 280.

There can be no reasonable excuse for seeking to prove in  
fact, if it is a fact, that the deceased had been an unchari-  
tated to the support of his mother by independent and voluntary  
testimony, as it is a matter capable of direct and positive  
proof if such condition existed. It was not in the  
declaration that the deceased contributed to the support of his  
mother during his life time. This was a material averment and  
should have been proven by competent testimony. The burden of  
damages allowed depends entirely upon the testimony in this  
case. "The pecuniary loss, taking into view all the circumstances,  
must be kept in view as the only proper basis of the verdict."

Chicago & North Branch R. R. v. [illegible] 111 Ill. 2d [illegible]  
The evidence in this case shows that the deceased was  
eight years old; that the mother was not living with him but was  
living with a daughter, and in order that the mother might obtain  
damages, beyond mere nominal damages, it was necessary to show  
pecuniary interest in the continuance of the life of the deceased.  
In a review of the authorities in the case of [illegible] v. [illegible]  
A.R. 227 Ill. 334, the Supreme Court says, "The first case  
decided by this court that has any bearing on the case here under  
discussion is City of Chicago v. Mayor, 111 Ill. 369. It was  
there held that damages under the act can only be for pecuniary  
loss, and not for bereavement; that such action is for those that  
have a more or less direct pecuniary interest in the continuance



of the life of the deceased. This statute makes pecuniary loss of the widow and next of kin the sole measure of damages. .... If, then, the next of kin are collateral kindred of the deceased and have not been receiving from him pecuniary assistance, and are not in a situation to require it, it is immaterial how near the relationship may be, only nominal damages can be given, because there has been no pecuniary injury. If, on the other hand, the next of kin have been dependent on the deceased for support, in whole or in part, it is immaterial how remote the relationship may be, there has been a pecuniary loss, for which compensation under the statute must be given." Whether John Scadman was or was not in good faith contributing to the support of his mother was a material question to be considered by the jury upon the trial of this case, and before a verdict should be permitted to stand for such support it must, in our judgment, be at least proven by competent testimony.

Counsel for appellant have argued very extensively in their brief that appellant was not guilty of negligence and that the deceased was not in the exercise of due care and caution for his own safety. These, however, are questions of fact which must  
-F-  
be determined by the jury, and in view of the fact that there must be another trial of this case we deem it improper to enter into a discussion of the facts or of the weight to be given to the testimony of the several witnesses.

We are of the opinion that the court erred in admitting the exhibits A. to H. referred to, and the hearsay testimony of the several witnesses as above stated, and for that reason the judgment of the lower court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

(To be published in abstract only.)



of the life of the deceased. This statute makes pecuniary loss of the widow and next of kin the measure of damages. If, then, the next of kin are collateral heirs of the deceased and have not been receiving from him pecuniary assistance, and are not in a situation to require it, it is immaterial how near the relationship may be, only pecuniary loss can be given, because there has been no pecuniary injury. If, on the other hand, the next of kin have been dependent on the deceased for support, in whole or in part, it is immaterial how remote the relationship may be, there has been a pecuniary loss, for which compensation under the statute must be given. Whether John Goodman was or was not in good faith contributing to the support of his mother was a material question to be considered by the jury upon the trial of this case, and before a verdict should be returned he should be heard for such support it must, in our judgment, be at least proven by competent

#### Testimony

Counsel for appellant have argued very extensively in their brief that appellant was not guilty of negligence and that the deceased was not in the exercise of due care and caution for his own safety. These, however, are questions of fact which must be determined by the jury, and in view of the fact that there must be another trial of this case we deem it improper to enter into a discussion of the facts or of the weight to be given to the testimony of the several witnesses.

We are of the opinion that the court erred in admitting the exhibits A. to B. referred to, and the hearsay testimony of the several witnesses as above stated, and for that reason the judgment of the lower court is reversed and the cause remanded for a new trial.

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 9th day of October, A. D. 1913.

A. C. Millsbaugh  
Clerk of the Appellate Court.

# OPINION

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# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon on the Fourth Tuesday in the month of March in the year of our LORD, one thousand nine hundred and thirteen, the same being the 25th day of March, in the year of our LORD, one thousand nine hundred and thirteen.

Present:

Hon. JAMES C. McBRIDE, Presiding Justice.

Hon. OWEN P. THOMPSON, Justice.

Hon. HARRY HIGBEE, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff.

And afterwards in Vacation, after said March Term, to-wit: On the 9th day of October, A. D. 1913, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Righty

183 I.A. 484

~~ERROR TO~~  
APPEAL FROM

No. 26 vs.

March Term, 1913.

Circuit COURT

Band COUNTY

Raukin

TRIAL JUDGE  
Hon. Louis Bernreuter





March Term, A. D. 1913.

Cora Rankin Ruffy,

vs.

Warren Rankin, Jr.,

Appellee,

Appellant.)

Appeal from the  
Circuit Court of  
Bond County.

183 I.A. 484

McBride, P.J.

This was a petition filed by appellee in the County Court of Bond County to require appellant to inventory certain property therein described as the property of the estate of Warren Rankin, Sr., that had been held out and claimed by appellant as partnership property and belonging to him and the deceased as partners. The Circuit Court determined that said property belonged to the estate of Warren Rankin, Sr., and required appellant to inventory it as property of the estate. From this decision the appellant prosecutes this appeal.

This was a petition filed by appellee for citation against appellant alleging that Warren Rankin, Sr., departed this life November 5, 1910, leaving a will which was duly probated and averring that appellant was executor under said will, and in the amended petition alleges that defendant did not make out and file a perfect inventory of all of the personal estate or proceeds thereof which came into his possession; that he failed to inventory \$2,079.33 which is proceeds of property belonging to Warren Rankin, Sr., at the time of his death, and the further sum of six hundred dollars which was withdrawn from the bank by appellant, two notes one given by W. B. Hawkins for \$437.00 and one by Warren Rankin, Jr., for four hundred dollars, and that such property and notes are not held by him as executor and that he neglects and refuses to account for the same to the executor as required by law. That he claims and pretends that a co-partnership existed between him and the deceased at and prior to his

March Term, A. D. 1911.

Appeal from the  
Circuit Court of  
Humboldt County.

Case No. 101. 20.  
Appellee,  
vs.  
Appellant, et al.  
Indorsed.

1831.A.484

McBride, J. J.

This was a petition filed by appellee in the County Court of Humboldt County to remove appellant to inventory from the estate of Warren Harkin, Sr., that had been held out and claimed by appellant as partnership property and belonging to him and the deceased partners. The Circuit Court determined that said property belonged to the estate of Warren Harkin, Sr., and returned appellant to inventory of the property of the estate. From this decision the appellant prosecutes this appeal.

This was a petition filed by appellee in the County Court of Humboldt County to remove appellant to inventory from the estate of Warren Harkin, Sr., that had been held out and claimed by appellant as partnership property and belonging to him and the deceased partners. The Circuit Court determined that said property belonged to the estate of Warren Harkin, Sr., and returned appellant to inventory of the property of the estate. From this decision the appellant prosecutes this appeal.

death and that on the 22nd of January, 1911, he inventoried said property as belonging to the co-partnership and asks that he be required to account fully for all such property which he so wrongfully and fraudulently withholds and which he has failed to inventory belonging to said estate. To this petition the defendant filed an answer denying that said property belonged to the estate of Warren Rankin, Sr., but avers that it was the ~~property~~ <sup>and proceeds of the property</sup> of a partnership that had existed between himself and Warren Rankin, Sr., prior to his decease, and avers that he has accounted for said property and inventoried the same as co-partnership property, and avers that said co-partnership was at the time of the decease of Warren Rankin, Sr., unsettled and in an unfinished condition. Upon the hearing by the Circuit Court an order was entered in favor of the appellee determining that the property mentioned in said petition and answer was the sole property of the estate of Warren Rankin, Sr., and did not belong to the alleged co-partnership of Warren Rankin Sr., and Warren Rankin, Jr., and directed and required appellant to inventory said property or the proceeds as belonging to the estate of Warren Rankin, Sr.

Appellee enters her motion herein to dismiss this appeal setting forth that such judgment was not a final order or decree and could not be appealed from and for that reason the appeal should be dismissed.

Upon an examination of the petition it will be discovered that the defendant pretended that a co-partnership existed between him and the deceased and avers that no such partnership or any in fact existed and that the claim of appellant with reference to such partnership was fraudulent. And it further alleges that the property mentioned in the petition was not co-partnership property but belonged to the deceased; and among other things the petition prays that defendant be required to account fully

death and that on the 22nd of January, 1911, he inventoried  
said property as belonging to the co-partnership and asks that  
he be required to account fully for all such property which he  
as wrongfully and intentionally withheld and when he was failed  
to inventory belonging to said estate. To this petition the de-  
fendant filed an answer denying that said property belonged to  
the estate of Warren Rankin, Sr., and that it was the prop-  
erty of a partner in said estate and that it was the prop-  
erty of a partner in said estate, and avers that he was account-  
ed for said property and inventoried the same as co-partnership  
property, and avers that said co-partnership was at the time of  
the decease of Warren Rankin, Sr., undivided and in an undivided  
condition. Upon the hearing by the Circuit Court an order  
was entered in favor of the appellee determining that the prop-  
erty mentioned in said petition and answer was the sole property  
of the estate of Warren Rankin, Sr., and did not belong to the  
alleged co-partnership of Warren Rankin Sr., and Warren Rankin,  
Sr., and directed and required appellant to inventory said prop-  
erty or the proceeds as belonging to the estate of Warren Rankin,  
Sr.

Appellee enters her motion herein to dismiss this appeal  
setting forth that such judgment was not a final order or decree  
and should not be entered, and that the said appeal should be dismissed.

Upon an examination of the petition it will be discovered  
that the defendant pretended that a co-partnership existed be-  
tween him and the deceased and avers that no such partnership or  
any in fact existed and that the claim of appellant with refer-  
ence to such partnership was fraudulent. And it further alleges  
that the property mentioned in the petition was not co-partner-  
ship property but belonged to the deceased; and shows other things  
the appellee says that defendant be required to account fully



for all said property which he is wrongfully and fraudulently withholding and which he has failed to make an inventory as belonging to the estate. The order of the court determines that the specific property mentioned in the petition and claimed as co-partnership property is the sole property of the estate of Warren Rankin, Sr. It seems to us that this is a final judgment against appellant and that such order would be conclusive against him and finally and forever settles the ownership of this property, if permitted to stand. That an appeal will lie from such an order is fully sustained in the case of Martin vs. Martin--170 Ill., 18. The motion to dismiss the appeal is overruled. Appellant contends that the judgment of the Court in this case was manifestly against the weight of the evidence and this is now the sole question to be determined. The appellee to sustain her position that this was the sole property of Warren Rankin, Sr., deceased, placed her husband, S. J. Ruffy upon the witness stand and proved by him that within three or four hours after the death of Warren Rankin, Sr., that Ruffy had a conversation with appellant at the barn in which Ruffy said to appellant, "That is your team, isn't it"; appellant said, "No, I don't own them, I have not paid anything on them, I was to pay four hundred dollars but I never paid anything for them, I am going to let them go at the sale." Ruffy then said, "That is not necessary Warren, because Cora would not ask you to do anything of the kind if your father agreed to let you have them for four hundred dollars, she will never object to it." Appellant said "No, I am going to let them go at the sale. I don't own a hoof of stock on earth." That Cora told him that so far as she was concerned he could keep the team and put it in his note for four hundred dollars. He also said he thought there had been four mules sold to Ridgway for six hundred dollars that had not been taken away and that there was an account of \$437.00 against Hawkins for mules and some hay, and that appel-



[illegible]

lant said if Cora was afraid of that account he would take it up and put it in his note. The appellee, Cora Rankin Hufty, testified to substantially the same conversation. Appellant, however, says that he does not remember of having had any such conversation with them, and this was all the evidence introduced by appellee, except that she placed appellant upon the witness stand and sought to prove the allegations of her petition by him. Appellant, however, stated that he and his father had agreed to go into partnership and that he was to have a half interest in the business. They were to borrow money at the bank to begin business with, as neither had any money, and that they did borrow money at the State Bank of Hoyles & Sons, and gave their joint note for the same and the money was placed to the credit of Warren Rankin, Jr., but both the father and son checked on the account. That the business was commenced about fourteen years ago. That they had both lived on the business, had paid off indebtedness but had never declared any dividend. About one year before the death of Warren Rankin, Sr., they quit the partnership <sup>business</sup> but never had a settlement. They had on hands unsold property described in the petition and inventoried as co-partnership property. He admits that during the existence of this co-partnership his father received about eighteen hundred dollars from an estate and had borrowed about three thousand dollars from Mrs. Hufty but that all of this money did not go into the co-partnership business and did not equal the amount of Warren Rankin's, Sr., indebtedness. That Warren Rankin, Sr., expended considerable money on improvements on the two places owned by him and stated that all of the property described in the petition belonged to the co-partnership of himself and his father. It further appears from the evidence that the stock was kept upon the farm owned by Warren Rankin, Sr., and assessed for taxes in his name. This was all of the testimony introduced by ap-

laint said if Gora was afraid of that account he would take it up and put it in his note. The appellee, Gora Rankin Kelly, testified to substantially the same conversation. Appellant, however, says that he does not remember of having had any such conversation with them, and this was all the evidence introduced by appellee, except that she placed appellant upon the witness stand and sought to prove the allegations of her petition by him. Appellant, however, stated that he and his father had agreed to go into partnership and that he was to have a half interest in the business. They were to borrow money at the bank to begin business with, he neither had any money, and that they did borrow money at the State Bank of Hayes & Sons, and gave their joint note for the same and the money was placed to the credit of Warren Rankin, Jr., but both the father and son checked on the account. That the business was commenced about four-teen years ago. That they had both lived on the business, and paid off indebtedness but had never declared any dividends. About one year before the death of Warren Rankin, Sr., they quit the partnership but never had an agreement. They had no funds properly described in the petition and inventoried as co-partnership property. He admits that during the existence of this co-partnership the father received about eight hundred dollars from an estate and had borrowed about three hundred dollars from the bank and that all of this money had not been paid to the co-partnership business and did not equal the amount of Warren Rankin's Dr. indebtedness. That Warren Rankin, Jr., expended considerable money on improvements on the two places owned by him and stated that all of the property described in the petition belonged to the co-partnership of himself and his father. It further appears from the evidence that the estate was sold upon the last word by Warren Rankin, Jr., and assessed for tax as if the same. Shows all of the testimony introduced by the

pellee to sustain her petition. Appellant then produced a number of witnesses who testified to conversations they had had with Warren Rankin, Sr., during his life time, in which he told the respective witnesses that he and his son, the appellant, were in partnership and were buying stock together. In fact, produced several witnesses who testified to having sold them stock. He also produced Buy B. Hoyles, cashier of the State Bank, who testified, "I recall when Warren Rankin, Sr., came in and made a statement he and Warren were intending to buy some mules and wished to borrow some money to purchase the mules with. They borrowed the money, both Warren Rankin, Sr., and Warren Rankin, Jr., signed the note I was acquainted with the signature of these parties. The check of either was honored against the account. I think they both deposited to that account. I know of several different stock transactions they had; these transactions took place for a number of years before the death of Warren Rankin, Sr." He also testified that the account was kept in the name of Warren Rankin, Jr. M. B. Ezell testified that he was a stock trader and had known the deceased since 1882, and the month of January, 1906, sold him eighteen mules, and at that time had a conversation with Warren Rankin, Sr., in which the said Rankin told him that he and his son were in partnership, and later on in a conversation about the selling of said mules that Warren Rankin, Sr., told him, when speaking about what they had been offered for the mules, "That we would have taken the offer but Warren was not willing." This witness also said, "I had a conversation with him relative to the business of stock buying; I am unable to give the conversation verbatim. He came to my house and I sold him eighteen head of young mules. He stayed all night. I have been acquainted with him a good while. In a conversation that evening talking to me and my son in law and about me and my son in law trading with him, he remarked that he and his son were buying, that it was a two partnership business; we sold to them and they



police to sustain her petition. Appellant then produced a number of witnesses who testified to conversations they had had with Warren Rankin, Sr., during his life time, in which he told the respective witnesses that he and his son, the appellant, were in partnership and were buying stock together. In fact, produced several witnesses who testified to having sold them stock. He also produced Guy B. Boyles, cashier of the State Bank, who testified, "I recall when Warren Rankin, Sr., came in and made a statement he and Warren were intending to buy some mules and wished to borrow some money to purchase the mules with. They borrowed the money, both Warren Rankin, Sr., and Warren Rankin, Jr., signed the note I was acquainted with the signature of both parties. The object of either was to secure against the payment of that note both guaranteed by that account. I know of several different stock transactions they had; these transactions took place for a number of years before the death of Warren Rankin, Sr." He also testified that the account was kept in the name of Warren Rankin, Jr. W. M. Howell testified that he was a stock trader and had known the deceased since 1887, and the month of May, 1907, sold him eighteen mules, and at that time had a conversation with Warren Rankin, Sr., in which the said Rankin told him that he and his son were in partnership, and later on in a conversation about the selling of said mules that Warren Rankin, Sr., told him, when speaking about what they had been offered for the mules, "That we would have taken the offer but Warren was not willing." This witness also said, "I had a conversation with him relative to the business of stock buying; I was unable to give the conversation verbatim. He came to my house and I told him eighteen head of young mules. He stayed all night. I have been acquainted with him a long while. In a conversation that evening relating to me and my son in law and about me and my son in law dealing with him, he remarked that he and his son were buying that it was a law partnership business; we sold to them and they



would buy." Albert Kagy testified that "arren Rankin, Sr., told him many times that he and his son Warren Rankin, Jr., had everthing together on the place. A. T. Alie testified that Warren and his father came out to his place together and bought mules. Ralph Ridgway said he was a stock buyer and that he had bought mules of the Rankins for the last five or six years and that he would talk with both of them but the dealing was generally done with appellant; that a short time before the death of Warren Rankin, Sr., witness bought three or four mules of Warren Rankin, Jr., and that at one time in looking at these mules with a view of buying them, when Warren Rankin, Jr., was not present, Warren Rankin, Sr., told him to see appellant and whatever he did would be all right with him. And this was but a short time before the death of Warren Rankin, Sr. W. E. Hawkins testified that Warren Rankin, Sr., told him, "To talk to Warren, that they did business together and whatever Warren did was satisfactory to him." This witness also stated that he had several conversations with the old man Rankin about his business relations with his son and, "That he would always send him to Warren with directions that whatever Warren did was satisfactory to him." Walter Bass says that about two or three years before the death of Warren Rankin, Sr., that he bought thirty-seven head of mules of young Warren and that the old gentleman was present at the conversation concerning the trade but that he left it to Warren, and further said, "That the old gentleman said that anything we done with Warren was satisfactory to him." And further stated, "That Warren Rankin, Sr., stated to him one morning a year or so before his death that he and his son, Warren Rankin, Jr., were partners." J. B. Schmollinger, a farmer, testified that he had some business relations with Warren Rankin, Sr., relative to the sale of some cows about five or six years before his death and that the deceased would refer the witness to his son.

... told him many times that he and his son Warren Rankin, Jr., had  
... Warren and his father came out to his place together and bought  
... mules. Ralph Ridgway said he was a stock buyer and that he had  
... bought mules of the Rankins for the last five or six years and  
... that he would talk with both of them but the dealing was con-  
... strictly done with Rankin, Sr. and that he never saw Warren  
... of Warren Rankin, Sr., witness bought three or four mules of  
... Rankin, Sr., and that at one time it happened at some  
... place with a view of buying them, when Warren Rankin, Jr., was  
... not present. Warren Rankin, Sr., told him to see appellant and  
... whatever he did would be all right with him. And this was what  
... Rankin, Sr., told him to do. Rankin, Sr., testified that Warren Rankin, Jr.,  
... testified that Warren Rankin, Sr., told him, "To talk to Warren,  
... that says his business is satisfactory and whatever Warren did was sat-  
... isfactory to him." This witness also stated that he had never  
... of conversations with the old man Rankin about his business re-  
... lations with his son and, "That he would always send him to War-  
... ren with directions that whatever Warren did was satisfactory  
... to him." This witness says that about one or three years before  
... the death of Warren Rankin, Sr., that he himself talked with Warren  
... of mules of young Warren and that the conversation was pleasant  
... at the conversation concerning the trade but that he felt it in-  
... correct, and testified that "that the gentleman said that any-  
... thing we done with Warren was satisfactory to him." And further  
... stated, "That Warren Rankin, Jr., stated in his own talking  
... years or so before his death that he was his son, Warren Rankin,  
... and that he had been doing business with Warren Rankin, Jr., for  
... five to the point of some good horse life or the goods which his  
... father and that the deceased would take the witness to his home

He also said, "When I bought the cows about five years before his death, he said him and his son were partners." Joseph Brown, a witness, and Treasurer of the County, testified that Warren Rankin, Sr., came into the office and asked, "If I was buying mules and I told him I was and he told me Warren and he were feeding a bunch and wanted me to buy them. I told him I would come down. I went out and looked at the mules and bought them. Young Rankin and his father were there." James A. Ward testified to having sold Warren Rankin, Sr., some stock about one year and a half before his death; "I had conversations with him often about his business with his son Warren; he would say, 'Warren and I' His talk would be about his mules and what he and Warren were doing." Mr. Vandussen testified that he had dealings with ~~hi~~ them and that he would be with both of them together and separately. The testimony above quoted shows that there was a contract entered into between appellant and his father to buy stock together and that in pursuance of that contract they did from time to time purchase stock, and considerable stock is shown by the evidence to have been purchased and sold by them. It is true that no written contract was entered into between them, and that the business was conducted in rather a loose manner, and probably not in the same way that business between strangers would be conducted but it is not essential to a partnership that any particular form or formality should be adopted. In determining whether a partnership exists if the agreement is not in writing the intention of the parties must ~~be~~ be ascertained from their language and conduct. *Leede vs. Townsend*--228 Ill., 451.

When a question similar to this was at one time before the appellate Court an instruction that had been given to the jury was approved, and is as follows: "The Court instructs the jury that to constitute a partnership as to the partners themselves it is only necessary that each of them contribute either capi-

He also said, "When I bought the cows about five years before  
 his death, he said him and his son were partners." Joseph  
 Brown, a witness, and Treasurer of the County, testified that  
 Warren Harkin, Sr., came into the office and asked, "If I was  
 buying knives and I told him I was and he told me Warren and he  
 were feeding a bunch and wanted me to buy them. I told him I  
 would come down. I went out and looked at the knives and bought  
 them. Young Harkin and his father were there." James A. Smith  
 testified to having sold Warren Harkin, Sr., some knives about  
 four years and a half before his death. "I had conversations with  
 him often about his business with his son Warren; he would say,  
 'Warren and I.' His talk would be about his knives and what  
 he and Warren were doing." Mr. Vandewater testified that he had  
 dealings with both of them and that he would be with both of them  
 together in business. The testimony shows that Warren Harkin  
 there was a contract entered into between defendant and his father  
 to buy stock together and that in pursuance of that contract  
 they did from time to time purchase stock, and considerable  
 stock is shown by the evidence to have been purchased and sold  
 by them. It is true that no written contract was entered into  
 between them, and that the business was conducted in rather a  
 loose manner, and probably not in the same way that business  
 between strangers would be conducted but it is not essential to  
 a partnership that any particular form or formality should be  
 observed. In determining whether a partnership exists it is  
 agreement is not in writing the intention of the parties must be  
 be ascertained from their language and conduct. Leeds vs. Town-

tal, labor, credit or skill and care or two or more of these, and that all the contributions are put together into a common stock or common enterprise to be used for the purpose of carrying on business for the common benefit." Swannell vs. Hamilton-- 123 App. 545.

We are of the opinion, after a careful examination of this evidence, and all the facts and circumstances, that a ~~no~~<sup>partnership</sup> partnership existed between the appellant and his father and we cannot concur in the conclusion reached by the Circuit Court Judge in this case, and are of the opinion that the judgment rendered is manifestly against the weight of the evidence, and the judgment of the Circuit Court is reversed and the cause remanded.

REVERSED AND REMANDED.

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(To be published in abstract only.)



tal, labor, credit or skill and care or two or more of these, and that all the contributions are put together into a common stock or common enterprise to be used for the purpose of carrying on business for the common benefit." *Swannell vs. Swannell* - 123 App. 345.

We are of the opinion, after a careful examination of this evidence, and all the facts and circumstances, that a partnership existed between the appellant and his father and we cannot concur in the conclusion reached by the Circuit Court Judge in this case, and are of the opinion that the judgment rendered is manifestly against the weight of the evidence, and the judgment of the Circuit Court is reversed and the cause remanded.

REVERSHED AND REMANDED.

(To be published in abstract only.)

*I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.*

*IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 9th day of October, A. D. 1913.*

.....  
*Clerk of the Appellate Court.*

# OPINION

*Fee \$* .....

.....

337

# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon on the Fourth Tuesday in the month of March in the year of our LORD, one thousand nine hundred and thirteen, the same being the 25th day of March, in the year of our LORD, one thousand nine hundred and thirteen.

Present:

Hon. JAMES C. McBRIDE, Presiding Justice.

Hon. OWEN P. THOMPSON, Justice.

Hon. HARRY HIGBEE, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff.

And afterwards in Vacation, after said March Term, to-wit: On the 9th day of October, A. D. 1913, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

183 I.A. 485

**ERROR TO  
APPEAL FROM**

No. 27

vs.

March Term, 1913.

Circuit COURT

Massie COUNTY

Harris & Cole Bros

TRIAL JUDGE

Hon. A. W. Lewis





March Term, A. D. 1913.

Mollie Finney,

Appellee, )

vs. )

Harris &amp; Cole Bros., )

Appellant. )

Appeal from

Massac County

Circuit Court.

183 I.A. 485

McBride, F.J.

This suit was commenced at the January Term, 1911, of the Circuit Court of Massac County, tried at the April Term, 1911. Judgment for five thousand dollars for plaintiff. Appealed to the Appellate Court of the second District by agreement; was reversed by the Appellate Court and <sup>the case</sup> is reported on page 326 of Vol. 168 of the Appellate Court Reports. The case was re-docketed and tried at the January Term, 1913, of the Circuit Court and resulted in a verdict and judgment for plaintiff in the sum of four thousand dollars; to reverse this judgment appellant has prosecuted this appeal.

The machine in question is known as a double surfacing endless bed planer, being an appliance for dressing both sides of a plank at a single operation. It consists in part of a heavy iron table about three feet high, seven feet long and two and a half feet wide. About midway between the ends of the table is an open space of four feet in length, and the full width of the table, which is occupied by what is known as an endless bed which consists of a series of iron slats connected together with links so as to form an endless bed. The upper side of this endless bed is on a level with the top of the table and when the machine is in operation moves towards the rear of the machine, carrying the plank being planed from the front end of the machine where it is fed into the machine by the operator, and passing through the machine comes out dressed on both sides. This

10101 .S .A .SIST HOTE

Appeal from  
Circuit Court  
District of Columbia

Appellant.  
Harris & Cole Bros.,  
vs.  
Appellee.  
Jellie Tinnery.

584 . A . 1381

L. F. Johnson

the sum of four thousand dollars; to reverse this judgment of the Circuit Court of Kansas County, tried at the April Term, 1811. This suit was commenced at the January Term, 1811, of the Circuit Court of Kansas County, tried at the April Term, 1811. Judgment for five thousand dollars for plaintiff. Appealed to the Appellate Court of the second District by agreement; was reversed by the Appellate Court and is reported on page 326 of Vol. 168 of the Appellate Court Reports. The case was re-argued and tried at the January Term, 1813, of the Circuit Court and resulted in a verdict and judgment for plaintiff in the sum of four thousand dollars; to reverse this judgment of the Circuit Court of Kansas County, tried at the April Term, 1811. This suit was commenced at the January Term, 1811, of the Circuit Court of Kansas County, tried at the April Term, 1811.

The machine in question is known as a double extruding and  
less bed planer, being an appliance for dressing both sides of  
a plank at a single operation. It consists in part of a heavy  
iron table about three feet high, seven feet long and two and a  
half feet wide. About midway between the ends of the table is  
an open space of four feet in length, and the full width of the  
table, which is occupied by what is known as an endless bed  
which consists of a series of iron slats connected together  
with links so as to form an endless bed. The upper side of this  
endless bed is on a level with the top of the table and when  
the machine is in operation moves towards the rear of the machine,  
carrying the plank being planed from the front end of the machine  
and where it is fed into the machine by the operator, and passes  
through the machine comes out dressed on both sides. This

machine consisted of an upper and lower cutterhead that was designed to plane the upper and lower sides respectively of the board passing through the machine. There were also connected with this machinery four feed rollers, two live ones and two dead ones. The two live ones being situated in the rear of the machine, one directly over the other, and operated by a separate belt. In the feeding of this machinery the operator would stand in front of it and as the planks would pass through they were planed upon both sides and delivered at the rear end of the machine. Plaintiff was feeding this machine at the time of the injury. He had, as he says, partly passed one board through under one end of the roller and had started another board through upon the other end of the roller when the first board kicked back out of the machine and struck plaintiff's thigh and injured him.

There were three counts in the declaration but counsel for both parties agreed that the case was tried and determined by the second count, which, after describing the machine, alleges that the defendant negligently and carelessly permitted and suffered said planer to be in a dangerous state of repair. That the defendant negligently and carelessly permitted the said boxing holes in the back end of the weight lever passing, of said front end dead roller to become so worn and enlarged that when properly set with said upper cutterhead with said weights thereupon, it did not press down said plank or timbers tightly upon said feed bed, but permitted said timber to be loose thereunder; that the defendant negligently and carelessly permitted the rubber chugs, which were designed to hold down said middle dead roller tightly upon the timbers being passed through said machine, and thereby in connection with the said feed bed, to force said timbers on through said planer and prevent them from being thrown back by the force of the said cutterheads towards and against the operator, to become worn out and insufficient to per-

Machine consisted of an upper and lower cuttershead that was designed to plane the upper and lower sides respectively of the board passing through the machine. There were also connected with this machinery four feed rollers, two live ones and two dead ones. The two live ones being driven in the rear of the machine, one directly over the other, and operated by a separate belt. In the feeding of this machinery the operator would stand in front of it and as the boards would pass through they were planed upon both sides and delivered at the rear end of the machine. Plaintiff was feeding this machine at the time of the injury. He had, as he says, pulled forward and pushed through under one end of the roller and had started another board through upon the other end of the roller when the first board struck him out of the machine and injured him.

There were three counts in the declaration but counsel for both parties agreed that the case was tried and determined by the second count, which, after describing the machine, alleged that the defendant negligently and carelessly permitted and authorized said planer to be in a dangerous state of repair. That the defendant negligently and carelessly permitted the said planing holes in the back end of the weight lever passing, of said front end dead roller to become so worn and enlarged that when properly set with said upper cuttershead with said rollers thereupon, it did not press down said plank or timbers tightly upon said feed bed, but permitted said plank or timber to be loose between the rollers and carelessly permitted the rollers, which were designed to hold down said timbers between rollers tightly upon the timbers being passed through, said rollers, and thereby in connection with the said feed bed, to force said timbers on through said planer and prevent them from being thrown back by the force of the said cuttersheads towards and against the operator, to become worn and in such injured condition



form their function; and negligently substituted and negligently permitted to be substituted, a coil wire spring in the place and stead of the rubber chug on the left end of said second dead roller, which said coil wire spring was then and there ~~was~~ wholly insufficient to perform the functions required of it and said rubber chug for which said coil wire spring had been negligently substituted; and that the defendant negligently and carelessly permitted the said set screws designed to adjust, and to hold up said lower live roller tightly to the timbers being passed through said machine, and to thereby force said timbers on through said planer, and also to prevent them from flying or kicking back toward and against the operator, to become so worn and small that by the usual motion of said machine they became loosened and thereby permitted said lower live roller to drop down, thereby permitting said planks or timbers to be thrown back by the force of the said cutterheads while in operation toward and against the operator. The declaration then ~~is~~ avers that the defendant had knowledge of the defective and dangerous condition of the said machine, and that the same was out of repair and was not in a reasonably safe state of repair to be operated, or by the exercise of reasonable care ought to have known this fact; and that he did not know the machine was out of repair and could not have known it by the exercise of reasonable care; that his means of knowledge was not equal to that of the defendant and that the defendant had better and more means of knowledge that said machine was not in a reasonably safe condition of repair than the plaintiff had. That while in the employ of the defendant and in obedience to the order of the foreman of defendant, and while in the exercise of due care for his own safety and by reason of the unsafe condition of said machinery a piece of timber passed into said machine by plaintiff, in the usual manner, was thrown back out of



from limits functional and negligently substituted and no liberty  
ly permitted to be substituted, a coil wire spring in the place  
and stand of the rubber chug on the left end of said second  
dead roller, which said coil wire spring was then and there was  
wholly insufficient to perform the functions required of it and  
said rubber chug for which said coil wire spring had been neg-  
ligently substituted; and that the defendant negligently and  
carelessly permitted the said set screws designed to adjust and  
to hold up said lower live roller tightly to the timbers being  
pressed between said machine, and to thereby cause said roller  
on through said planer, and also to prevent them from flying  
or kicking back toward and against the operator, to become so  
worn and small that by the usual motion of said machine they  
became loosened and thereby permitted said lower live roller to  
drop down, thereby permitting said planks or timbers to be  
thrown back by the force of the said cuttershanks while in oper-  
ation toward and against the operator. The declaration then ex-  
pressly avers that the defendant had knowledge of the defective and danger-  
ous condition of the said machine, and that the same was out  
of repair and was not in a reasonably safe state of repair  
be operated, or by the exercise of reasonable care might be  
have known this fact; and that he did not know the machine was  
out of repair and could not have known it by the exercise of  
reasonable care; that his means of knowledge was not equal to  
that of the defendant and that the defendant had better and  
more means of knowledge than said machine was not in a reason-  
ably safe condition of repair than the plaintiff had. That  
while in the employ of the defendant and in obedience to the  
order of the foreman of defendant, and while in the operation  
of the same for his own safety and by reason of the defective con-  
dition of said machinery a piece of timber passed into said ma-  
chine by plaintiff, in the usual manner, was thrown back out of

said machine by the force of said cutterheads to and against the plaintiff, striking him about midway of the left thigh and breaking said thigh, and bruising and lacerating the flesh of plaintiff.

It is not denied by counsel for appellant that the machinery was out of repair in the manner claimed by appellee, and no evidence was offered upon the trial to dispute appellee's contention that the machinery was out of repair or that appellee was injured to the extent claimed. Counsel for appellant, however, strenuously insist that the defective condition of the machinery was not the proximate cause of plaintiff's injury and that it was an assumed risk.

As to the former proposition of proximate cause, counsel for appellant says, "It is not denied by appellant that insufficient pressure of the second dead roll or the two live rolls, or both, on the plank in question caused it to kick out of the machine. But that is not the question at issue. The real question is, What caused the insufficient pressure on the plank; was it the defective rolls or was it the thinness of the plank?" This is a question of fact that will have to be determined from the evidence and circumstances in the case, and, as we think, was one of the questions submitted to the jury. The evidence of appellant's witnesses tends to prove that the plank that was kicked back and injured plaintiff was less than seven-eighths of an inch in thickness, that it could not have been planed by this machine because the gauge was set at  $7/8$  of an inch, that it probably had been planed by another machine and was by mistake placed in the pile of boards that plaintiff was to put through this machine; that being thinner than the second plank that was inserted by plaintiff, that when the plaintiff placed the second or thicker plank in the machine this released the pressure of the rolls from the ~~thinner~~ thinner plank and permitted the cutterheads to throw or kick the thinner plank against the plaintiff; that

said machine by the force of said engine, and the  
 the plaintiff, striking him about midway of the left thigh and  
 breaking said thigh, and bruising and lacerating the flesh of  
 plaintiff.  
 It is not denied by counsel for appellant that the engine  
 was out of repair in the manner claimed by appellee, and  
 no evidence was offered upon the trial to dispute appellee's  
 contention that the machinery was out of repair or that appel-  
 lee was injured to the extent claimed. Counsel for appellee,  
 however, strenuously insist that the defective condition of the  
 machinery was not the proximate cause of plaintiff's injury and  
 that it was an assumed risk.  
 As to the former proposition of proximate cause, counsel  
 for appellee says, "It is not denied by appellant that in 1911  
 plaintiff presented at the annual board meeting of the  
 company, and the board in question caused it to be put out of the  
 machine. The fact of its being put out of the machine is  
 question is, what caused the inefficient condition of the plank?  
 was it the defective rolls or was it the thickness of the plank?"  
 This is a question of fact that will have to be determined from  
 the evidence and circumstances in the case, and, as we think,  
 was one of the questions submitted to the jury. The evidence  
 of appellee's witnesses tends to prove that the plank that was  
 kicked back and injured plaintiff was less than seven-eighths of  
 an inch in thickness, that it could not have been planed by this  
 machine because the gauge was set at  $\frac{7}{8}$  of an inch, that it  
 probably had been planed by another machine and was of substan-  
 tially the same thickness as the plank that plaintiff was injured by.  
 This machine, that being the case, then the second question that was  
 submitted by plaintiff, that when the plaintiff placed the second  
 or thicker plank in the machine this released the pressure of the  
 rolls from the plank and permitted the other rolls  
 to drive or beat the plank against the plaintiff, and

even if the rollers were defective the insertion of the thicker plank into the machine before the thinner one had past out was the proximate cause of the injury and that such act was negligent upon the part of the plaintiff. Upon the other hand the evidence on behalf of appellee tends to show that the rollers were so adjusted that the ends were weighted and worked up and down in a slot or groove so that when two planks, one a little thicker than the other, were placed one at one end of the roller and the other at the other end of the roller, that the thicker plank would cause the other end of the roller to press down upon the ~~roller~~ <sup>thinner</sup>; that if the difference in the thickness was not too great that two planks varying in thickness could be placed in the machine at the same time by keeping them out of the center; one of appellant's witnesses of thirty-five years experience, testified "That where the planks were the same or about the same size it would make no difference; that when one was thicker than the other the thick plank will travel faster than the thinner one." He also said that if you have a piece "That is an inch and a half thick and one that is two and one fourth I should not want to run these two through." The testimony of appellee is positive that the board he placed in the machine that was kicked back was one inch in thickness, rough and had not been planed and that it was cut by the planes as it passed through. Another witness testified that within three months prior to this a plank had kicked back on him the same way because the spring that held the roller fell out. That the vibration of the machine would jolt it out and also jolt <sup>the</sup> set screw and this would let the roller down below the surface of the head; the rubber cushion that had worn out and that had been supplied by a defective spring was on the left side of the machine and it was the left plank that kicked back. Appellee says that he was passing the planks through at one end of the dead roller and one at the other.



even if the rollers were defective the insertion of the thin-  
ner plank into the machine before the thinner one had passed out  
was negligent upon the part of the plaintiff. Upon the other hand  
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down upon the ~~thinner~~ <sup>thinner</sup> plank; that if the difference in thickness could be  
was not too great that two planks varying in thickness could be  
placed in the machine at the same time by keeping them out of  
the center; one of appellee's witnesses at thirty-five years  
experience, testified that years had passed with the best of  
about the same size it would make no difference; that when one  
was thicker than the other the thick plank will travel faster  
than the thinner one." He also said that if you have a piece  
there is an even and a wide track and one that is too wide and  
thick I should not want to put them in together. The fact  
testimony of appellee is positive that the board he placed in the  
machine that was kicked back was one inch in thickness, tough  
and had not been planed and that it was not by the planer as it  
was not planed, machine witness testified that before thirty  
months prior to this a plank had kicked back on him the same  
way because the spring that held the roller fell out. That the  
rotation of the machine would take it out and also take the  
board and this would let the roller down below the surface of  
the board; the rubber cushion that had worn out and that had been  
mounted by a defective spring was on the left side of the roller  
and he was mounting the plank through one end of the board roller  
it was one of the rollers.



The letter written by appellee in which he said to appellant, "I do not feel that you are under any obligations to me but ask this as a favor of you", is explained by appellee as having been written prior to the time that he learned of the defective condition of the machinery.

There were other facts and circumstances testified to that we regard as unnecessary to recount or collate which tend in some degree to corroborate the theory of both the appellant and appellee as to the cause of the board being kicked back; but all considered, the evidence is conflicting and we are unable to say that the jury was not warranted in disregarding appellant's theory as to the proximate cause of this injury. The evidence is at least conflicting and under such circumstances the proximate cause becomes ~~one~~ one of fact for the jury to determine. "What is the proximate cause of an injury is ordinarily a question of fact to be determined by the jury from a consideration of all the attending circumstances. It only becomes a question of law or pleading when the facts are not only undisputed but also such that there can be no difference in the judgment of reasonable men in the inference to be drawn therefrom." *Nall vs. Taylor*--247 Ill., 585.

Appellant's second contention is, that this is a case of assumed risk and his argument upon this question is based upon the testimony that shows appellee was foreman, that he understood the machinery in question as well as any one connected with appellant's business, that he had adjusted the machine at various times and on that morning had adjusted it for Hankins; that he had helped Mr. West, the Company machinist, to repair the machine and says that Finney was charged with a special duty of adjusting and setting up the machines, testing them, trying them to see if they were in working order. All this had to be done by Finney before the operator of the machine was permitted to operate it. That Finney had the capacity to know and did know the

The letter written by appellee in which he said to appel-  
lant, "I do not feel that you are under any obligation to me  
but ask this as a favor of you," is explained by appellee as  
having been written prior to the time that he learned of the  
defective condition of the machinery.

There were other facts and circumstances testified to

that we regard as unnecessary to recount or collate which tend  
in some degree to corroborate the theory of both the appellant  
and appellee as to the cause of the horse being kicked back; but  
all considered, the evidence is conflicting and we are unable  
to say that the jury was not warranted in disregarding appel-  
lant's theory as to the cause of this injury. The  
evidence is at least conflicting and under such circumstances  
the proximate cause becomes one of fact for the jury to de-  
termine. "What is the proximate cause of an injury is ordin-  
arily a question of fact to be determined by the jury from a  
consideration of all the attending circumstances. It only be-  
comes a question of law or pleading when the facts are not only  
undisputed but also such that there can be no difference in the  
judgment of reasonable men in the inference to be drawn there-

from." 111 Ill. 2d 111, 112.

Appellant's second contention is, that this is a case of

assumed risk and his argument upon this question is based upon

the fact that the horse was injured and that he was

riding the machine in question as well as the fact that the

appellant's business, that he was adjusting the engine of various

times and on that account was exposed to the risk of injury

and that he was not injured with a greater duty of adjust-

ing and caring up the machine, which fact, being true, it

sees if they were in working order. All this had to be done by

himself before the injury of the machine was repaired and

the fact that the machine was the property of the company and that the

defective condition of this machinery and that if he did not he had equal opportunities with appellant to ascertain its condition. We do not believe that counsel for appellant are borne out by this record in their statement that Finney was charged with the performance of such duties as foreman that required him as a matter of law to know the fact that this machine was out of repair and in a defective condition. We think the record shows the extent of his duties to be, that as machine foreman he put the knives on the machines and adjusted the heads of the stock to be dressed; that is, in adjusting these machines he put the knives on them and raised or lowered the heads by a crank; that the center heads had three knives or bits and they could be taken off and ground when they were dull, and he set the knives on these machines and then looked after the work ~~that~~ that they performed to see whether or not the machines turned out good work, and if anything broke about the machines he notified the machinist; he was not a machinist, a Mr. West was the machinist, and appellee had at one time helped him to babbit the top head of the machine, that is, West was crippled and could not carry the ladle and appellee carried it for him. Appellee states that at the time of his injury he did not know the condition of repairs of this machine; that he did not know what shape the inside roll or the live rolls were in; that he had never examined them and that from where he stood in position of operator he could not see the back live rolls or the inside dead rolls; there were castings that prevented it. Barrett, a witness for appellee, testified that at the time plaintiff was injured the threads on these screws at both ends of the lower live roll were worn out, the effect of which was to let the roll drop down, making the space between the two rollers larger and preventing them from catching the timber passing through the machine. That this condition had existed six months prior to the accident; that to see this condition one would have

defective condition of this machinery and that it he did not  
he had equal opportunities with appellant to ascertain the con-  
dition. We do not believe that counsel for appellant are born  
out of this record in their statement that Winney was charged  
with the maintenance of both rollers as follows: That appellant  
him as a matter of law to know the fact that this machine was  
out of repair and in a defective condition. We think the rec-  
ord shows the extent of his duties so he, that as machine fore-  
man he put the knives on the machine and adjusted the bands of  
the rollers to be dressed; that is, in adjusting these rollers  
he put the rollers in line and raised or lowered the bands by a  
screw; that the upper bands had tensioning at both ends and  
could be drawn off and ground when they were dull, and he put  
the knives in these positions; that then looked after the way the  
that they got round to see whether or not the machine turned  
out good work, and if anything broke about the machine he re-  
paired the machine; he was not a mechanic, a roller dresser  
adjuster, and appellant had at one time helped him to do this  
the top head of the machine, that is, that was equipped and  
would not carry the bands and rollers carried it for him, so  
appellant states that at the time of his injury he did not know  
the condition of repairs of this machine; that he did not know  
what shape the inside roll or the live rolls were in; that he  
had never examined them and that from where he stood in posi-  
tion of operator he could not see the back live roll or the  
inside dead rolls; there were castings that prevented it. Fur-  
ther, a witness for appellant, testified that at the time of the  
injury the strands on these screws at both ends of the  
live roll were worn out, the effect of which was to let  
the roll drop down, making the space between the two rollers  
larger and preventing them from dressing the strands  
through the machine. That this condition had existed six weeks  
prior to the accident; that on the morning of the accident



to go around in behind the machine and get down in under it. That before the accident he had called the attention of both Mr. Wood and Mr. Bremer (the former being foreman of the defendant's factory at Metropolis at the time Mr. Finney was injured) to the condition of that middle roll and the lower live roll. The evidence shows that at that time the appellants kept in their employ a Mr. West who was a machinist and whose duty it was to repair the machines when out of order, and it seems that the duties of appellee were confined, so far as this machine was concerned, to the putting in and sharpening of the knives, gauging and examining the work that they did. That the regular operator of this machine was Ben Barrett. Appellee testifies, and it is not disputed, that it was not his regular duty to adjust the planer in question and that he had had but very little to do with this planer. We are not satisfied that appellee knew, or even had equal means of knowing the defective condition that appellant had, as the evidence shows that appellant had been informed of the defects complained of in this case and had been in fact notified that the chug under one of these rollers was defective and had been requested to purchase another, and the defendant's foreman said he did not know where he could get another, and no effort is shown to have been made to procure another. We think, under the facts as shown by this testimony that it became a question of fact to be determined by the jury as to whether or not the appellee assumed the risk as charged. It is said by our Supreme Court, "Ordinarily, of course, the question of whether the servant has assumed the danger which he encounters or has been guilty of contributory negligence, is one of fact but as in other cases the question will become one of law when but one conclusion can be drawn from the evidence by all reasonable minds." *Brown vs. Sigel, Cooper Co.*, 191 Ill., 235; *Cozouski vs. Ostrosky*--163 App., 199.

That the machiner in question was defective, as charged in



to be shown in looking the machine and get down in under it.  
 That before the accident he had called the attention of him  
 Mr. Wood and Mr. Bremer (the former being foreman of the de-  
 fendant's factory at Westfield at the time Mr. Plunk was in  
 jury) to the condition of that electric coil and the latter five  
 rolls. The evidence shows that at that time the appellants  
 kept in their employ a Mr. West who was a machinist and whose  
 duty it was to repair the machines when out of order, and it  
 seems that the duties of appellee were confined, so far as this  
 machine was concerned, to both cutting in and sharpening of the  
 knives, gauging and examining the work that they did. That the  
 regular operator of this machine was Ben Harvett. Appellee was a  
 tinner, and it is not disputed, that it was not his regular duty  
 to adjust the knives in question and that he had not very  
 little to do with this planer. He are not satisfied that appel-  
 lee knew, or even had some means of knowing the defective con-  
 dition that appellant had, as the evidence shows that appellant  
 had been informed of the defect and failed to do this work and  
 had been in fact notified that the thing was out of order and  
 was defective and had been requested to purchase another,  
 and the defendant's foreman said he did not know where he could  
 get another, and an effort is shown to have been made to do  
 this another. We think, under the facts as shown by this evi-  
 dence that it became a question of fact to be determined by the  
 jury as to whether or not the appellee assumed the risk in doing  
 so. It is one of our highest courts, "Voluntarily, of course, the  
 question of whether the person has assumed the risk will be  
 answered by the facts of each case. The question will be answered by the  
 facts and not by the knowledge and the extent of the  
 reasonable minds." Brown vs. Sigel, Cooper Co., 101 Ill., 188;  
 Ostromski vs. Ostrosky--103 App., 189.  
 That the question in question was defective, as charged in

the declaration, and that the appellant knew of the defective condition appears clearly to be shown by this record, and the jury having determined that the negligence charged was the proximate cause and that under the circumstances the appellee did not assume the risk, we can see no reason for saying that the verdict of the jury is manifestly against the weight of the evidence or that the verdict should be disturbed, and as there is no question made as to the extent of the injury and the amount of the damages sustained by the plaintiff, the judgment of the lower Court will be affirmed.

JUDGMENT AFFIRMED.

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(To be published in abstract only.)

the decision, and that the appellant knew of the defective condition appears clearly to be shown by this record, and the jury having determined that the negligence charged was the proximate cause and that under the circumstances the negligence did not assume the risk, we can see no reason for saying that the verdict of the jury is manifestly against the weight of the evidence or that the verdict should be disturbed, and as there is no question with us as to the extent of the injury and the amount of the damages sustained by the plaintiff, the judgment of the lower court will be affirmed.

JUDGMENT AFFIRMED.

(To be published in abstract only.)

*I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.*

*IN TESTIMONY WHEREOF, I have set my hand, and affixed the seal of said Court at Mt. Vernon, this ..... 9th ..... day of October, A. D. 1913.*

.....  
*Clerk of the Appellate Court.*

# OPINION

*Fee \$*

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon on the Fourth Tuesday in the month of March in the year of our LORD, one thousand nine hundred and thirteen, the same being the 25th day of March, in the year of our LORD, one thousand nine hundred and thirteen.

Present:

Hon. JAMES C. McBRIDE, Presiding Justice.

Hon. OWEN P. THOMPSON, Justice.

Hon. HARRY HIGBEE, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff.

And afterwards in Vacation, after said March Term, to-wit: On the 9th day of October, A. D. 1913, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Baudy

No. 32 vs.

March Term, 1913.

Litchfield & Madison  
Ky Co -

183 I.A. 492

ERROR TO  
APPEAL FROM

Circuit COURT

Madison COUNTY

TRIAL JUDGE  
Hon. W. E. Hadley



March Term, A. D. 1913.

George C. Bandy,  
vs.  
Litchfield & Madison  
Ry. Co.,  
Appellant.

Appeal from  
Madison Circuit Court.

183 I.A. 492

McBride, P.J.

The appellee obtained judgment against appellant in the Circuit Court of Madison County for \$1,500.00, which judgment the appellant seeks to reverse by this appeal. This action is brought by appellee to recover damages for injuries sustained by him by being thrown from a motor car driven by appellant's train dispatcher, C. E. Bickel, when being returned from his work.

The declaration charges negligence and improper conduct upon the part of Bickel in driving the motor car so that it ran against a dog that was upon the track near a bridge or trestle on defendant's railroad, whereby the motor car was derailed and appellee thrown therefrom and injured, on May 23, 1910. One Aloys Schmidt was also riding upon said motor car and was thrown therefrom and injured at the same time, and on account of the same alleged negligence of C. E. Bickel in operating said motor car, and recovered a judgment in the circuit court of Madison County for said injury. At the October Term, 1912, the case of Aloys Schmidt vs. Litchfield & Madison Ry. Company was before this court on appeal from Madison County, seeking to reverse a judgment that Schmidt had recovered against the appellant. The declaration and pleas in the case of Aloys Schmidt were the same as the declaration and pleas in this case, except as to the fourth, or additional count, which will be noted later in this

March Term, A. D. 1913.

Appeal from  
Madison County Court.

George C. Bandy,  
Appellee,  
vs.  
Litchfield & Madison  
Hy. Co.,  
Appellant.

1881 A. 492

Schmidt, J.

The appellee obtained judgment against appellant in the Circuit Court of Madison County for \$1,500.00, which judgment the appellant seeks to reverse by this appeal. This action is brought by appellee to recover damages for injuries sustained by him by being thrown from a motor car driven by appellant's train dispatcher, C. E. Bickel, when being returned from his

The declaration charges negligence and improper conduct upon the part of Bickel in driving the motor car so that it ran against a dog that was upon the track near a bridge or trestle on defendant's railroad, whereby the motor car was derailed and appellee thrown therefrom and injured, on May 23, 1910. Appellee Schmidt was also riding upon said motor car and was thrown therefrom and injured at the same time, and on account of the same alleged negligence of C. E. Bickel in operating said motor car, and recovered a judgment in the circuit court of Madison County for said injury. At the October Term, 1912, the case of *Alvay Schmidt vs. Litchfield & Madison Ry. Company* was before this court on appeal from Madison County, seeking to reverse a judgment that Schmidt had recovered against the appellant. The declaration and plea in the case of *Alvay Schmidt* were the same as the declaration and plea in this case, except as to the "tooth" or additional count, which will be noted later in this

opinion; and as to the negligent acts charged against the defendant, the same witnesses gave testimony therein and the testimony so given was substantially the same as the witnesses' testimony given in this cause as to such accident, and the manner and cause of its occurrence. On the appeal in the Schmidt case this court reversed the judgment and remanded the cause because the plaintiff had failed to establish a right of action by a preponderance of the evidence but that the manifest weight of the evidence was in favor of the appellant. We see no reason for changing our opinion as to the appellant's negligence as to this accident and no valid reason has been pointed out to us why such opinion is not correct, and as the declaration and evidence in the two cases are substantially the same upon the questions so presented and considered we can see no reason for re-writing an opinion upon the same facts and charges, as it would be a repetition of the same facts and argument and we have decided to adopt as the opinion herein the opinion rendered in the case of Schmidt vs. Litchfield & Madison Ry. Co., and the judgment in this case is reversed and the cause remanded.

There was, however, in this case, in addition to the counts in the declaration in the former case, an additional or fourth count charging that Bickel, the motorman was incompetent; that defendant knew or should have known of such incompetency and was negligent in the employing of him as such motorman, and then alleging that said Bickel so negligently and carelessly operated said motor car as to cause it to run against a dog upon a bridge, whereby the car was derailed and appellee injured. Appellee offered the evidence of three witnesses tending, in a degree, to show the carelessness and incompetency of Bickel as such motorman; at the close of plaintiff's evidence, however, this testimony was excluded by the court and a verdict directed for the defendant as to the fourth count of the declaration. Upon which ruling the appellee has assigned cross error. While the tes-





timony of the witnesses so excluded as to Bickel's incompetency was slight, it was a matter, under the rulings of our Supreme Court, that was entitled to go to the jury at that period of the trial of the case, and the court erred in excluding it from the jury. We do not believe, however, that this action of the court or this evidence could in any manner effect this verdict, for under this count it became necessary to prove not only the incompetency and knowledge of such incompetency, or opportunity therefor, upon the part of the defendant, but it was essential to also prove that the servant Bickel was actually guilty of the negligence charged but as we have held that Bickel was not guilty of negligence as charged in the declaration, and shown by the evidence of the witnesses, the action of the court in excluding this evidence could not in any manner have effected this verdict, or the rights of appellee herein.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

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claim of the witness is excluded as to Michael's negligence was slight, it was a matter, under the ruling of our Supreme Court, that was entitled to go to the jury at least for consideration of the trial of the case, and the court erred in excluding it from the jury. We do not believe, however, that this action of the court as to this evidence could in any manner affect the verdict, for under this count it became necessary to prove not only the incompetency and knowledge of such incompetency, or negligently negligent, upon the part of the defendant, but it was essential to also prove that the servant Michael was actually guilty of the negligence charged but as we have said that Michael was not guilty of negligence as charged in the action again, and shown by the evidence of the witnesses, the action of the court in excluding this evidence could not in any manner have affected this verdict, or the rights of appellee herein. The judgment is reversed and the cause remanded.

REMARKS OF THE COURT

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(To be published in abstract only.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 9th day of October, A. D. 1913.

.....  
Clerk of the Appellate Court.

# OPINION

*Fee §* ...



A H 99

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# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon on the Fourth Tuesday in the month of March in the year of our LORD, one thousand nine hundred and thirteen, the same being the 25th day of March, in the year of our LORD, one thousand nine hundred and thirteen.

Present:

Hon. JAMES C. McBRIDE, Presiding Justice.

Hon. OWEN P. THOMPSON, Justice.

Hon. HARRY HIGBEE, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff.

And afterwards in Vacation, after said March Term, to-wit: On the 9th day of October, A. D. 1913, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Maorn

vs.

No. 41

March Term, 1913.

Murphy

183 I.A. 499

ERROR TO  
APPEAL FROM

City COURT

E. St Louis COUNTY

TRIAL JUDGE  
Hon. Wm Vandewater



March Term, A. D. 1913.

Neil Moore, by his next  
friend,Appellee,  
vs.

P. H. Murphy,

Appellant.

Appeal from the  
City Court of  
East St. Louis.

183 I.A. 499

McBride, P.J.

It is sought by this appeal to reverse a judgment recovered against the appellant for two thousand dollars.

The appellant was operating a plant in the City of East St. Louis manufacturing metal covers for railroad cars and had in his factory several machines used for the cutting of the tin. These machines were called shears and consisted of a steel table about waist high, seventy-two inches in length and fifteen inches wide. Immediately against the back of the table, and flush with it, was bolted a knife or shear blade; two or three inches above this was a movable blade, which, in the operation of the machine, came down upon the lower blade similar in operation to a pair of scissors, and severed the metal placed between the blades. The operator when standing at his place of work would be facing the shear blades, fifteen inches from him, and if standing at the center of the table it would extend thirty-six inches to the left and right of the center line of his body. At the left of the table, and running at right angles to the knife, was a gauge against which the operator would put the metal in order to square it with the knife; immediately back of the knife blade was another movable gauge regulating the distance the metal should be shoved under the knife. While the number of treadles attached to this machine is in dispute we think it appears from a preponderance of the evidence that there were three treadles, located a few inches from the floor and projecting an inch

March Term, A. D. 1913.

Appeal from the  
City Court of  
East St. Louis.

Neil Moore, by his next  
friend,  
Appellee,  
vs.  
F. H. Murphy,  
Appellant.

1831.A.499

Verdict, 11.

It is sought by this appeal to reverse a judgment recovered against the appellant for two thousand dollars. The appellant was operating a plant in the City of East St. Louis manufacturing metal covers for railroad cars and had in his factory several machines used for the cutting of the tin. These machines were called shears and consisted of a steel table about waist high, seventy-two inches in length and fifteen inches wide. Immediately against the back of the table, and flush with it, was bolted a knife or shear blade; two or three inches above this was a movable blade, which, in the operation of the machine, came down upon the lower blade similar in operation to a pair of scissors, and severed the metal placed between the blades. The operator when standing at the place of work would be facing the shear blades, fifteen inches from him, and if standing at the center of the table it would extend thirty-six inches to the left and right of the center line of his body. At the left of the table, and running at right angles to the knife, was a gauge against which the operator would put the metal in order to square it with the knife; immediately back of the knife blade was another movable gauge regulating the distance the metal should be shoved under the knife. While the number of tread-les attached to this machine is so minute as to be almost negligible, a person of the intelligence of the witness that there were three tread-les, issued a few inches from the foot and protruding an inch

or two outward, upon which the operator would press his foot in order to throw the machine into gear. One of these treadles was at the extreme right/<sup>end</sup> of the machine, one at the left end and the other at the center. The operator would place his foot on one of these treadles and upon pressing downward upon it would throw the machine into gear; this would cause the knife blade to move downward and to return to its normal position until the operator would again press the treadle. This machine was arranged to cut pieces 8 X 8 inches square, and was performed by taking a strip of any desired length or width and first cutting off eight inch strips and then taking the strips and cutting the strip into pieces eight inches square. The appellee, a boy of the age of 17 years, commenced work for appellant on December 16th. The first work he did was to remove scraps of tin and about three o'clock in the afternoon of the first day he was put to work operating one of these machines and continued at that work until about two o'clock the next day when he was injured. It is claimed by appellee that in cutting the tin he would have scraps left from every piece, which he piled up on the end of the table and to his right. That about two o'clock of the 17th he received a piece of tin to cut into squares that was somewhat crimped, that he undertook to press the crimp out of the tin and while engaged in the pressing of the crimp out of the tin he right ~~had~~<sup>was</sup> came under this knife and about this time the pieces of tin, that had been piled on the end of the table, fell off and struck the treadle at that end of the table and caused the knife to come down and cut off three of his fingers close to the hand and the fore finger at the first joint.

It further appears from the evidence that at the time he was set to work/<sup>with</sup> this machine he was cautioned not to allow his ~~had~~<sup>was</sup> at any time to get under the knife; and appellant claims that at the/<sup>same</sup> time he instructed him how to use the machine, how to handle the tin so that the scraps would fall back of the machine



or two outward, upon which the operator would press his foot in order to throw the machine into gear. One of these treadles was at the extreme right of the machine, one at the left end and the other at the center. The operator would place his foot on one of these treadles and upon pressing downward upon it would throw the machine into gear; this would cause the knife blade to move downward and to return to its normal position until the operator would again press the treadle. This machine was arranged to cut pieces 8 X 8 inches square, and was performed by taking a strip of any desired length or width and first cutting off eight inch strips and then taking the strips and cutting the strip into pieces eight inches square. The appellant, a day at the age of 17 years, commenced work for appellant on December 18th. The first work he did was to remove scraps of tin and about three o'clock in the afternoon of the first day he was put to work operating one of these machines and continued at that work until about two o'clock the next day when he was injured. It is claimed by appellant that in cutting the time he would have scraps left from every piece, which he piled up on the end of the table and to his right. That about five o'clock on the 17th he received a blow at the end of the square that was somewhat cramped, that he undertook to press the crimp out of the tin and while engaged in the pressing of the crimp out of the tin he right hand came under the table and about this time the pieces of tin, that had been piled on the end of the table, fell off and struck the treadle at that end of the table and caused the knife to come down and cut off three of his fingers close to the hand and the fore finger at the first joint. It further appears from the evidence that at the time he was set to work on this machine he was cautioned not to allow his hand to get under the knife; and appellant claims that at the time he instructed him how to use the machine, how to handle the tin so that the scraps would fall back of the machine

on to the floor. There is, however, a conflict of the evidence upon this question which will be noted later.

There are two counts in the declaration. The first, after alleging that the plaintiff was of the age of 17 years and had no experience as an operator and did not know how to properly and safely protect the clutch of the machine and that the unprotected condition of said clutch made the machine dangerous; it was known to the defendant but not known to the plaintiff and that while operating the machine one of the patterns with which he had been furnished became crooked and bent, that the plaintiff threw the machine out of gear and proceeded to straighten the pattern and while in the exercise of due care for his own safety a portion of the pile of metal remnants which had been piled upon the side of his machine fell down upon the unprotected clutch which threw the machine into gear and forced the knife of the machine down and upon the right hand of the plaintiff, whereby plaintiff was injured.

The second count is substantially the same as the first, except that it avers that defendant negligently failed and refused to have the said pile of remnants carried away so that the same could not accumulate and topple over on the clutch of the machine.

The errors assigned by counsel are in substance, that the plaintiff assumed the risk; that the injury was occasioned by his own negligence. That the plaintiff operated the machine in direct violation of his instructions. That the judgment is not supported by the evidence. That the remarks of plaintiff's counsel to the jury were so vicious as to constitute reversible error.

The evidence of appellee is that he had never had any experience in operating a machine of this kind; that he was of the age of 17 years and had worked with this machine from about two

on to the floor. There is, however, a conflict of the evidence upon this question which will be noted later.

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alleging that the plaintiff was of the age of 17 years and had no experience as an operator and did not know how to properly and safely protect the clutch of the machine and that the unprotected condition of said clutch made the machine dangerous; it was known to the defendant but not known to the plaintiff;

and that while operating the machine one of the patterns with which he had been furnished became crooked and bent, that the

plaintiff threw the machine out of gear and proceeded to straighten on the pattern and while in the exercise of due care for his own safety a portion of the pile of metal remnants which had been

piled upon the side of his machine fell down upon the unprotected clutch which drove the machine into gear and caused the injury to the machine down and upon the right hand of the plaintiff, whereby plaintiff was injured.

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The errors assigned by counsel are in substance, that the plaintiff assumed the risk; that the injury was caused by his own negligence. That the plaintiff operated the machine in direct violation of his instructions. That the judgment is not supported by the evidence. That the removal of the plaintiff's counsel to the jury were so vicious and constitute reversible

error. The evidence of negligence is that he had never had any experience in operating a machine of this kind; that he was of the age of 17 years and had worked with this machine from about two

o'clock of the 16th of September until the same hour of the 17th when his injury occurred. He says that during the time he had operated the machine he had cut several hundred pieces of tin and that frequently scraps of tin were left which he piled up on the right hand end of the table, and that just before he was injured he received a piece of tin that was ~~ceimped~~ which he undertook to straighten out and that while attempting to straighten it out the scraps of tin that he had piled up on the end of the table fell off, struck the treadle and threw the machinery in gear and caused the knife to come down upon his hand and cut it. Appellant denies that the accident happened in this manner and claims that appellee told the foreman within about fifteen minutes after the injury that "he was cutting the last piece and he pushed his fingers under too far and the blade came down and cut his fingers off." This statement is denied by appellee but appellant contends that even if it happened in the way in which it is claimed it did that the appellee assumed the risk of the pieces of tin falling off of the end of the table on to the treadle.

We are not inclined to hold that a boy of the age of this one ~~had~~ and of his inexperience would be likely to foresee that the piling of the tin upon the end of the table would probably result in its tumbling off on the treadle and interfere with the working of the knife. We are not satisfied, however, from the evidence in this record that the accident happened in the manner claimed by appellee. The appellee is contradicted in many material matters by two witnesses who appear to us to be entirely disinterested and in no manner connected with appellant, and their statements are corroborated to some extent by the evidence of a third witness who was at work in the room at the time. The witness Hofflinger who had not worked for appellant for over two years, denies that he told appellee to place these scraps over to one side of the machine, and says that he saw appellee working upon the machine in the afternoon of the



o'clock of the 18th of September until the same hour of the 19th when his injury occurred. He says that during the time he had operated the machine he had cut several hundred pieces of tin and that frequently scraps of tin were left which he piled up on the right hand end of the table, and that just before he was injured he received a piece of tin that was coined which he undertook to straighten out and that while attempting to straighten it out the scraps of tin the he had piled up on the end of the table fell off, struck the treadle and threw the machinery in gear and caused the knife to come down upon his hand and cut it. Appellant denies that the accident happened in this manner and claims that appellee told the foreman within about fifteen minutes after the injury that "he was cutting the last piece and he pushed his fingers under too far and the blade came down and cut his fingers off." This statement is denied by appellee but appellant contends that even if it happened in the way in which it is claimed it did that the appellee assumed the risk of the pieces of tin falling off of the end of the table on to the treadle. We are not inclined to hold that a boy of the age of this one and of his inexperience would be likely to foresee that the falling of the tin upon the end of the table would result in his pushing off on the treadle and starting the machine. We are not satisfied, however, from the evidence in this record that the accident happened in the manner claimed by appellee. The appellee is contradicted in many material matters by two witnesses who appear to us to be entirely disinterested and in no manner connected with appellant, and their statements are corroborated to some extent by the evidence of a third witness who was at work in the room at the time. The witness Hollinger who had not worked for appellant for over two years, denies that he told appellee to place these scraps over to one side of the machine, and says that he saw appellee standing upon the machine in the afternoon of the



16th and on the morning of the 17th and that he was not piling any scraps upon the machine as he said he did. Charles Fifster also says that he saw appellee at work at the machine and gave him some directions as to how to cut the strips and that he saw no scraps piled upon the machine.

It further appears from the evidence in this case that at the time Hofflinger set the boy at work that he instructed the boy how to hold the machine and how to put the pieces of tin under it so as to at all times keep his hand away from the knife and how to place the tin so that in cutting the last piece, where a scrap would be left, that the scrap would fall on the floor at the rear of the machine, and showed him the gauge that was in front of the knife that he should use in cutting this last strip instead of using the gauge back of the knife, and at that time he says, "I told him to be sure and never get his hand under the blade, because if you make a mis-step and cause that blade to come down it would cut his fingers off or hand off or whatever he had under the machine, and never get his fingers or hand under the knife." The witness Dalton Cooley who worked upon another machine near where appellee was engaged at work, says he did not hear what was said but both Hofflinger and Fifster were there apparently giving instructions, and saw them pushing pieces of tin under the machine. All of which is denied by appellee except that he admits that Hofflinger told him not to get his hand under the machine. Whether the accident happened in the *that Hofflinger or appellee told him it did or in the manner* manner now claimed by appellee, the injury certainly could not have occurred at all if appellee had obeyed the instructions that were given to him by his employer. He certainly was old enough and had experience enough, after having been told by appellant's manager that he must not under any circumstances put his hand beneath that knife, and if he voluntarily placed his hand under the knife, in disobedience of positive orders then he would be guilty of such contributory negligence as to prevent a recovery.

18th and on the morning of the 17th and that he was not killing  
any scraps upon the machine as he said he did. Charles T. L.  
after also says that he saw appliances at work at the machine and  
gave him some directions as to how to cut the strips and that he  
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his hand under the machine. Further the accident happened in the  
fact that Hollinger was the one who was injured, the injury certainly could not  
have occurred at all if appliances had obeyed the instructions that  
were given to him by his employer. He certainly was old enough  
and had experience enough after having been told by witnesses  
located that he must not under any circumstances put his hand  
down that knife, and if he voluntarily placed his hand under  
the knife, he is absolutely at fault and it is his fault  
that he is liable for his own injury and he is not entitled to  
compensation for such contributory negligence as to prevent a recovery.

It is sought by counsel for appellee to excuse this act by saying that as the piece of tin was crimped it became necessary for appellee to press down upon it to get it straightened out so as to get it under the knife. Even though actuated by the best of motives, and what he deemed to be in his master's interest, he had no right to voluntarily proceed in direct violation of his order. Illinois Steel Co. vs. Kinnare, 100 App., 208.

We are referred by counsel for appellee to the case of U.S. Wind Engine Co. vs. Butcher--223 Ill., 638 as a case in point and as one that sustains the finding of the judgment of the lower Court in this case. We have examined the case referred to but do not think it entitled to the weight claimed for it, as it appears in that case that the machine was out of order; that the clutch would not catch and hold; that the spring which threw the clutch was weak. The question as to whether or not this machine was defective was said by the Court to depend upon the credibility of the witnesses, but in that case there were other witnesses, beside the plaintiff, who testified to the defect in the machine.

It is true as contended by counsel for appellee, that this court will not disturb the verdict of a jury unless it appears from the evidence that it is manifestly against its weight or the law. The witnesses for appellant appear fair and we can see no reason why they should be inclined to favor the appellant; they have no connection whatever with him.

3 We are also of the opinion that the remarks of counsel in the closing argument to the jury were improper and the statement made by counsel in which he said, "We are not asking you to put your hands in Mr. Murphy's pockets because he is a rich man and owns a big plant out here," were certainly very improper and calculated to prejudice the minds of the jury, especially in view of the fact that the boy was severely injured and doubtless had already enlisted their sympathy. The statement of counsel ex-

It is sought by counsel for appellee to excuse this act by saying that as the piece of tin was crimped it became necessary for appellee to press down upon it to get it straightened out so as to get it under the knife. Even though actuated by the best of motives, and what he deemed to be in his master's interest, he had no right to voluntarily proceed in direct violation of his order. Illinois Steel Co. v. Chicago, 100 Ill. 203. We are referred by counsel for appellee to the case of U.S. v. King and Co. vs. Butcher--223 Ill. 638 as a case in point and as one that sustains the finding of the judgment of the lower Court in this case. We have examined the case referred to but do not think it entitled to the weight claimed for it, as it appears in that case that the machine was out of order; that the clutch would not catch and hold; that the spring which threw the clutch was weak. The question as to whether or not the machine was defective was said by the Court to depend upon the credibility of the witnesses, but in that case there were other witnesses, besides the plaintiff, who testified to the defect in the machine.

It is true recommended by counsel for appellee, that this Court will not disturb the verdict of a jury unless it appears from the evidence that it is manifestly against the weight of the law. The witnesses for appellant appear fair and we can see no reason why they should be inclined to favor the appellant; they have no connection whatever with him.

We are also of the opinion that the remarks of counsel in the closing argument to the jury were improper and the statement made by counsel in which he said, "we are not asking you to put your hands in Mr. Murphy's pockets because he is a rich man and owns a big plant out here," were certainly very improper and certainly prejudicial to the minds of the jury. We are of the opinion that the fact that the jury was so prejudiced against the appellant entitled their sympathy. The statement of counsel ex-



plaining why the first declaration was prepared in the manner it was, was certainly improper and if he had desired to explain or have explained to the jury how it happened that the declaration was drawn in the manner in which it was, the witnesses should have gone upon the stand and explained it.

While the evidence upon the question of the manner in which the boy's hand came under the knife (whether voluntarily or involuntarily) is not sufficiently clear and definite as to it having been voluntarily done to warrant us in reversing the judgment with a finding of facts, yet we are of the opinion that the verdict of the jury is manifestly against the weight of the evidence and that it will be highly improper to permit this verdict to stand, and for the reasons indicated the judgment of the lower Court is reversed and the cause remanded.

REVERSED AND REMANDED.

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(To be published in abstract only.)



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of the evidence and that it will be highly improper to permit this  
verdict to stand, and for the reasons indicated the judgment of  
the lower Court is reversed and the cause remanded.

REVEREND AND HONORABLE

THE COURT

(To be continued on separate sheet.)

*I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.*

*IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 9th day of October, A. D. 1913.*

*A. C. Millspaugh*  
Clerk of the Appellate Court.

# OPINION

*Fee \$*

1504

373

# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon on the Fourth Tuesday in the month of March in the year of our LORD, one thousand nine hundred and thirteen, the same being the 25th day of March, in the year of our LORD, one thousand nine hundred and thirteen.

Present:

Hon. JAMES C. McBRIDE, Presiding Justice.

Hon. OWEN P. THOMPSON, Justice.

Hon. HARRY HIGBEE, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff.

And afterwards in Vacation, after said March Term, to-wit: On the 9th day of October, A. D. 1913, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Roberts on

adm-

183 I.A. 504

~~ERROR TO~~

APPEAL FROM

vs.

No.

45

City

COURT

March Term, 1913.

Granite City

~~COUNTY~~

O. T. ARRAO

TRIAL JUDGE

Hon.

N. E. Hadley





Term No. 45.

Agenda No. 31.

March Term, A. D. 1913.

Alexander Robertson, Administrator  
of the estate of Jerry Watson, de-  
ceased,  
vs.  
The Chicago & Alton Railroad Com-  
pany,  
Appellee,  
Appellant.)

Appeal from the  
City Court of  
Granite City.

183 I.A. 504

McBride, F. J.

The trial of this case in the court below resulted in a judgment in favor of the plaintiff for six thousand dollars, to reverse which judgment defendant prosecutes this appeal.

The appellant and the Big Four Railroad own railroad tracks that parallel each other and pass through Granite City. The tracks of appellant is used by it and the Big Four for in-going or south bound trains, and the track of the Big Four is used by them for outgoing, or north bound trains, and these tracks cross nearly at right angles 19th, 20th and 22nd streets. 21st street does not extend over the tracks. The distance from 19th to 20th streets is six hundred twenty feet. On the morning of August 4th, 1911, the deceased, Jerry Watson, was driving a team and wagon eastward along 20th street and when he reached the place where this street intersects the tracks of appellant he was run over by appellant's passenger train going south and killed, his wagon destroyed and team also killed. Twentieth Street is much used and is said by many of the witnesses to be one of the principal streets of the City, and that at about that hour many people, teams and wagons pass over this street going to and from their work. About five hundred feet north from 20th street, and <sup>on</sup> one of the side tracks of appellant, there stood at that time seven or eight box cars which were being used by the employees of appellant. It is claimed by some of the witnesses

South Term, 1891.

Appeal from the  
City Court of  
Crawford City.

Alexander Robertson, Administrator  
of the estate of Jerry Watson, de-  
ceased,  
Appellee,  
vs.  
The Chicago & Alton Railroad Com-  
pany,  
Appellant.

1831 A. 501

Rehearing, 1891.

The trial of this case in the court below resulted in a judgment in favor of the plaintiff for six thousand dollars, to reverse which judgment defendant prosecuted this appeal.

The appellant and the Big Four Railroad own railroad tracks that parallel each other and pass through Crawford City. The tracks of appellant is used by it and the Big Four for its going or south bound trains, and the track of the Big Four is used by them for outgoing, or north bound trains, and these tracks cross nearly at right angles 19th, 20th and 22nd streets. That street does not extend over the tracks. The distance from 19th to 20th streets is six hundred twenty feet. On the morning of August 4th, 1911, the deceased, Jerry Watson, was driving a team and wagon eastward along 20th street and when he reached the place where this street intersects the tracks of appellant he was run over by appellant's passenger train going south and killed, his wagon destroyed and team also killed. Twentieth street is much used and is said by many of the witnesses to be one of the principal streets of the city, and that at about that hour many people, teams and wagons pass over this street going to and from their work. About five hundred feet north from 20th street, and at the side tracks of appellant, there stands a sign that has been or might have been used by the appellant of appellant. It is claimed by some of the witnesses

for appellee that as the deceased approached the tracks his view of the train at a distance of several hundred feet, as he approached this crossing, would be obstructed. It further appears from the evidence that the horses of the deceased had placed their front feet over the west track of appellant's road, when the passenger train in question was the distance of about six hundred feet from 20th street, and that the first the engineer saw of the deceased was when his train was at this distance and the horses just starting to cross the track but before the deceased had crossed the track the train caught him and killed him.

The testimony of the witnesses for appellant tends to show that at the time the engineer first discovered the deceased his train was running at a speed of eighteen or twenty miles per hour, and that when it struck the deceased it had been reduced to the speed of ten or twelve miles per hour. The testimony of the witnesses for appellee tends to show that at and prior to the time the train struck appellee that it was running at a speed from thirty to thirty-five miles per hour; that at the time the train struck the deceased he was hurled in the air and the horses and wagon were dragged down the railroad a distance of about two hundred to two hundred fifty feet. The ordinances of Granite City prohibited the running of passenger trains within its corporate limits at a greater rate of speed than twenty-five miles per hour. The deceased left surviving him his widow and four children, and had been earning fifteen dollars per week.

The declaration contained three counts but at the close of the evidence the second count was withdrawn by the plaintiff. The first count charging that the defendant by its servants so carelessly, improperly and negligently drove and managed said train that by and through such negligence the said train then and there ran and struck the wagon and plaintiff's intestate was thereby thrown from said wagon and crushed and wounded, from which he

for appellee that as the deceased approached the tracks his view  
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proached this crossing, would be obstructed. It further appears  
from the evidence that the horses of the deceased had placed  
their front feet over the west track of appellant's road, when  
the passenger train in question was the distance of about six  
hundred feet from said street, and that the first of the  
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witnesses for appellee tends to show that at and prior to the  
time the train struck appellee that it was running at a speed  
from thirty to thirty-five miles per hour; that at the time the  
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hundred to two hundred fifty feet. The ordinances of Granite  
City prohibited the running of passenger trains within its cor-  
porate limits at a greater rate of speed than twenty-five miles  
per hour. The deceased left surviving him his widow and four  
children, and had been married fifty or sixty years.  
The declaration contained three counts but at the close of the  
evidence the second count was withdrawn by the plaintiff. The  
first count charging that the defendant by its servants so care-  
lessly, negligently and negligently drove and managed said train  
that by and through such negligence the said train then and there  
threw from said wagon and crushed and wounded, from which he



died. And avers that the deceased was at that time in the exercise of due care for his own safety. The third count of the declaration avers that the train was operated over the crossing in question at a rate of speed prohibited by the ordinances of Granite City, which ordinance provided that no passenger train should be operated in the city at a greater speed than twenty-five miles per hour; and then avers failure upon the part of the defendant to comply with said ordinance, and avers that it operated its train at a speed of forty miles per hour, in consequence of which plaintiff was struck and killed.

It is contended by counsel for appellant that the defendant was not guilty of the negligence charged in the declaration and that it was not running its train at a greater rate of speed than twenty-five miles per hour, and this seems to have been the question to which most of the testimony of the witnesses was devoted upon the trial, and to which counsel for appellant and appellee have given the most attention in their briefs filed in this cause.

It is true, as suggested by counsel for appellant, that it is the duty of the appellate court to weigh the evidence given on the trial below and if upon a consideration of all of the evidence the appellate court is of the opinion that the verdict of the jury is the result of passion or prejudice, or is manifestly against the weight of the evidence, then such verdict should be set aside, but it is equally the duty of the court that unless they can say that such verdict is the result of passion or prejudice or manifestly against the weight of the evidence, it is their duty to sustain the verdict of the jury. The jury is made the arbitrator of facts submitted to it and if such facts have been fairly submitted and passed upon then the appellate court will not disturb its findings merely because a preponderance of the evidence may be one way or the other, or that the judges



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 part of the defendant to comply with said ordinance, and avers  
 that it caused the death of a certain person, whose name is  
 in the caption of this complaint and avers that it is  
 if is contended by counsel for defendant that the defendant  
 and was not guilty of the negligence charged in the declaration  
 and that it was not running its train at a greater rate of speed  
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 appellee have given the most attention in their briefs filed in  
 this cause.

It is now, as suggested by counsel for appellant, that if  
 is the duty of the jury to weigh the evidence, then  
 on the trial and it is a consideration of all of the ev-  
 idence the jurists must be at the point that the verdict of  
 the jury is the result of passion or prejudice, or is manifestly  
 against the weight of the evidence, then such verdict should be  
 not set aside, but it is equally the duty of the court that unless  
 they can say that such verdict is the result of passion or prej-  
 udice or manifestly against the weight of the evidence, it is  
 their duty to sustain the verdict of the jury. The jury is made  
 the arbiter of facts submitted to it and it is their duty  
 even taking testimony and issues from the witness stand  
 all out of the trial and make a determination  
 of the facts and the law, or that the judge

of the Appellate Court would have found differently upon a hearing. It is strenuously insisted by counsel for appellant that its train was not running at a greater rate of speed than twenty-five miles per hour at the time of the injury in question, and it introduces eight or ten witnesses who testify that the rate of speed at which appellant's train was running at the time it arrived at 20th street was from ten to fifteen miles per hour, while upon the other hand the appellee introduced the testimony of eight or ten witnesses who testify that appellant's train at the time it approached 20th street was running at the rate of speed of from thirty to thirty-five miles per hour, and the witnesses for appellee were equally as confident as those of appellant that their judgment on this was correct, and so far as we are able to see the witnesses for appellee were as credible and in as good position to see and determine the rate of speed at which this train was running as the witnesses for appellant, except, as is claimed by counsel, the man operating the train of appellant had an advantage over the others in determining the rate of speed. The conductor of appellant's train, however, testified, "I don't know how fast the train was running when it went over 20th street at Granite City; I should judge it was running about fifteen miles per hour. It is impossible for any one to be exact as to the speed at which a train is moving." There were many other facts and circumstances besides the judgment of the witnesses as to the rate of speed at which this train was running that the jury had a right to consider in determining what the real truth was, and among them as suggested by counsel for appellant was the necessity for the rate of speed testified to by witnesses of appellee; another was the distance which the train ran after having struck the deceased. It also appears from the evidence that deceased was traveling across the road driving his team in a walk, which would probably be at the rate of three to four miles. When the engineer first saw the deceased the train

of the Appellate Court would have found differently upon a hearing. It is strenuously insisted by counsel for appellant that the train was not running at a greater rate of speed than twenty-five miles per hour at the time of the injury in question, and it introduces eight or ten witnesses who testify that the rate of speed at which appellant's train was running at the time it arrived at 30th street was from ten to fifteen miles per hour, while upon the other hand the appellee introduced the testimony of eight or ten witnesses who testify that appellant's train at the time it approached 30th street was running at the rate of speed of from thirty to thirty-five miles per hour, and the witnesses for appellee were equally as confident as those of appellant that their judgment on this was correct, and so far as we are able to see the witnesses for appellee were as credible and in as good position to see and determine the rate of speed at which this train was running as the witnesses for appellant, except, as is claimed by counsel, the man operating the train of appellant had an advantage over the others in determining the rate of speed. The conductor of appellant's train, however, testified, "I don't know how fast the train was running when it went over 30th street at Granite City; I should judge it was running about fifteen miles per hour. It is impossible for any one to be exact as to the speed at which a train is moving." There were many other facts and circumstances besides the judgment of the witnesses as to the rate of speed at which this train was running that largely had a right to be considered in determining what the real truth was, and much that is suggested by counsel for appellant was the necessary for the rate of speed testified to by witnesses of appellee; another was the fact that the train ran after having struck the deceased. It also appears from the evidence that deceased was first-class - that the train striking him was in a well, which would probably be at the rate of from 20 to 30 miles. Some the evidence that was introduced in this

was then at a distance of six hundred feet north of 20th street, and at that time the front feet of the horses of deceased were just crossing the west rail and the deceased would not have had to travel more than twenty feet before his wagon would have been clear of the track, even if he had gone at the rate of three to four miles per hour only; if appellant's train had been traveling at the rate of eighteen to twenty miles per hour it would have been traveling only about five or six times as fast as the deceased was traveling and by the time deceased had crossed the tracks in the ordinary way of traveling, appellant would only have traveled about one hundred to one hundred twenty feet. It is said, however, in explanation of this, that deceased became confused but if the train was four hundred fifty to four hundred eighty feet away from him there would be no occasion for confusion; and while this is by no means conclusive, yet it was a fact along with the others that the jury had a right to consider in determining the truth of this matter. Counsel for appellant also insist that the deceased was not at the time in the exercise of due care for his own safety. This, too, was a question of fact for the jury, and in determining that they had a right to take into consideration the fact that the train would not be operated at a greater rate of speed than permitted by the ordinance, and the distance it was away from him when he attempted to cross if he saw the train, and the probabilities of his being able to get across in safety before the train reached him, together with all of the other facts and circumstances proven. It is purely a question of fact and we cannot say that the jury was not warranted in finding that he was in the exercise of due care. And the same may be said of the other proposition contended for by appellant that the speed of the train was not the proximate cause of the injury. These were all questions of fact for the jury to determine and we are not able to say that anything appears from this record that would warrant us in holding that the



was then at distance of six hundred feet north of 20th street,  
 and at that time the front feet of the horses of deceased were  
 just crossing the west rail and the deceased would not have had  
 to travel more than twenty feet before his wagon would have been  
 clear of the track, even if he had gone at the rate of three to  
 four miles per hour only; if appellant's train had been travel-  
 ing at the rate of eighteen to twenty miles per hour it would  
 have been traveling only about five or six times as fast as the  
 deceased was traveling and by the time deceased had crossed the  
 tracks in the ordinary way of traveling, appellant would only  
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 fact along with the others that the jury had a right to consid-  
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 not be operated at a greater rate of speed than permitted by the  
 ordinance, and the distance it was away from him when he attempt-  
 ed to cross if he saw the train, and the probabilities of his  
 being able to get across in safety before the train reached him,  
 together with all of the other facts and circumstances proved. It  
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 not warranted in finding that he was in the exercise of due care.  
 And the same may be said of the other proposition contended for  
 by appellant that the speed of the train was not the proximate  
 cause of the injury. These were all questions of fact for the  
 jury to determine and we are not able to say that anything ap-  
 pears from this record that would warrant us in holding that the



verdict of the jury was manifestly against the weight of the evidence.

Counsel for appellant also complains, in a general way, of the five instructions that were offered by it and refused by the Court. We have examined these instructions and find that such of them as was proper to give had been given in other instructions for appellant, and we think that the jury was liberally instructed on behalf of the appellant as to all of the questions involved in the refused instructions.

We are unable to say, after a careful reading of this entire testimony, that the court erred in denying appellant's motion for a new trial or that the verdict was excessive or against the weight of the evidence, and the judgment is affirmed.

JUDGMENT AFFIRMED.

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(To be published in abstract only.)

verdict of the jury was manifestly against the weight of the evidence.

Counsel for appellant also complains, in a general way,

of the five instructions that were offered by it and refused

of the court. We have examined these instructions and find

that each of them as was proper to give had been given in other instructions for appellant, and we think that the jury was fully

truly instructed on behalf of the appellant as to all of the

questions involved in the refused instructions.

We are unable to say, after a careful reading of this en-

tire testimony, that the court erred in denying appellant's

motion for a new trial or that the verdict was excessive or

against the weight of the evidence, and the judgment is af-

firmed.

ADJUDICATED MATTER.

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(To be published in abstract only.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 9th day of October, A. D. 1913.

A. C. Millspaugh  
Clerk of the Appellate Court.

# OPINION

Fee \$ <sup>45</sup> per annum in advance

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183 I.A. 514

345

# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon on the Fourth Tuesday in the month of March in the year of our LORD, one thousand nine hundred and thirteen, the same being the 25th day of March, in the year of our LORD, one thousand nine hundred and thirteen.

Present:

Hon. JAMES C. McBRIDE, Presiding Justice.

Hon. OWEN P. THOMPSON, Justice.

Hon. HARRY HIGBEE, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff.

And afterwards in Vacation, after said March Term, to-wit: On the 9<sup>th</sup> day of October, A. D. 1913, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Doncy

vs.

No. 53

March Term, 1913.

Kirsch  
et al

183 I.A. 514

~~ERROR TO~~  
APPEAL FROM

City COURT

St. Louis COUNTY

TRIAL JUDGE

Hon. R. H. Glavin  
Glavin





Agenda No. 22.

Prosper J. Soucy,  
Appellant,  
vs.  
Francis Kirsch and Minnie  
Kirsch,  
Appellees.

183 I.A. 514

This action was commenced before a Justice of the Peace and trial had in the City Court of East St. Louis, where judgment was rendered against the defendant for costs and he prosecutes this appeal. The suit grows out of a claim for rent. The appellee rented from one Mr. Abbott the property known as 1125 College Avenue, East St. Louis, and took possession of the same. There was no contract made by Abbott for repairs or anything of that character but the property was rented by appellee for which he agreed to pay thirty dollars per month, and so far as the record discloses no agreement was made upon the part of Abbott to make any repairs. Later on and about September, 1906, the appellant came into possession of this property by virtue of trusteeship. The property was in litigation and he held it in trust and claims that he was entitled to the rents. That appellant was entitled to the rents is not disputed. Appellee continued in possession of the property for some time after the rents began to accrue to appellant. In the meantime the sewer became out of repair and caused much annoyance to appellee and his family, the roof was leaking, plastering had fallen off in places, hydrant was leaking and the furnace also became out of repair. The appellee went to see appellant about the premises being out of repair and complained to him but appellant told him he had nothing to do with the repairing of the place and that all

March 10, 1912.

Appeal from the  
City Court of  
East St. Louis.

1831.A. 514

Proper & Sons,  
Appellant,  
vs.  
Francis Kirach and Minnie  
Kirach,  
Appellees.

Subsidiary.

This action was commenced before a Justice of the Peace and trial had in the City Court of East St. Louis, where judgment was rendered against the defendant for costs and he prosecuted this appeal. The suit grew out of a claim for rent. The appellees rented from one Mr. Abbott the property known as 1125 College Avenue, East St. Louis, and took possession of the same. There was no contract made by Abbott for repairs or anything of that character but the property was rented by appellees for which he agreed to pay thirty dollars per month, and so far as the record discloses no agreement was made upon the part of Abbott to make any repairs. Later on and about September, 1906, the appellant came into possession of this property by virtue of trusteeship. The property was in litigation and he held it in trust and claims that he was entitled to the rents. That appellant was entitled to the rents is not disputed. Appellees continued in possession of the property for some time after the rents began to accrue to appellant. In the meantime the sewer became out of repair and caused much annoyance to appellees and his family, the roof was leaking, plastering had fallen off in places, hydrant was leaking and the furnace also became out of repair. The appellees went to see appellant about the premises being out of repair and complained to him but appellant told him he had nothing to do with the condition of the premises and that all

he had to do was to collect the rents and refused to make any repairs. Appellee continued to live in the premises until January 4th of the following year, at which time he returned the key to appellant and at the time he returned the key he testified, "When I returned the key I told Mr. Soucy, here is the key, and he said, what about the rent; I said I am surprised Mr. Soucy that you ask about the rent, if you will tell me who the owner of the house is so I can sue him I will pay the rent. Mr. Soucy said, I don't know who the owner is, I have nothing to do with the place except to collect the rent; then I said, I will not pay any rent; Mr. Soucy said, you ought to pay some rent, I said, you should shame yourself to ask for rent; if you figure out to what expense we were put to there is money coming to us, we had more damage done to us than the rent amounts to. Mr. Soucy then said, all right Doctor, let the rent go then; I then said, <sup>Mr</sup> Mr. Soucy, the rent is paid then is it and Mr. Soucy said, yes, let it go, it is all right doctor. Mr. Soucy said, are you done moving, how do you like your new home; I told him pretty well and we both went, and I said good-bye Mr. Soucy. I met Mr. Soucy many times in the last five years, he would speak to me but never asked for rent one time," The son of appellee testifies to substantially the same facts.

It is not denied that appellee owed appellant the \$102.00 for rent at the time that appellee surrendered the key to appellant but it is insisted by appellee that he had a claim against appellant for damages suffered on account of the broken sewer pipe and a failure to otherwise repair said property and that in the contract above set forth appellant released his right of rent and that the claim for damages was settled.

It is contended by counsel for appellant that in as much as there was no agreement upon the part of appellant or any one representing him to repair the premises that there is no liability

he had to do was to collect the rents and refused to make any repairs. Appellee continued to live in the premises until January 4th of the following year, at which time he returned the key to appellant and at the time he returned the key he testified, "When I returned the key I told Mr. Soucy, here is the key, and he said, what about the rent; I said I am surprised Mr. Soucy that you ask about the rent, if you will tell me who the owner of the house is so I can sue him I will pay the rent. Mr. Soucy said, I don't know who the owner is, I have nothing to do with the place except to collect the rent; then I said, I will not pay any rent; Mr. Soucy said, you ought to pay some rent, I said, you should shame yourself to ask for rent; if you figure out to what expense we were put to there is money coming to us, we had more damage done to us than the rent amounts to. Mr. Soucy then said, all right doctor, let the rent go then; I then said, not Mr. Soucy, the rent is paid then is it and Mr. Soucy said, yes, let it go, it is all right doctor. Mr. Soucy said, are you done moving, how do you like your new home; I told him pretty well and we both went, and I said good-bye Mr. Soucy. I met Mr. Soucy many times in the last five years, he would speak to me but never asked for rent one time." The son of appellee testified to substantiating the same facts.

It is not denied that appellee owed appellant the \$102.00 for rent at the time that appellee surrendered the key to appellant but it is insisted by appellee that he had a claim against appellant for damages suffered on account of the broken sewer pipe and a failure to otherwise repair said property and that in the contract above set forth appellant released his right of rent and that the claim for damages was settled.

It is contended by counsel for appellant that in as much as there was no agreement upon the part of appellant or any one representing him to repair the premises that there is no liability



upon his part to repair or pay the repairs and cites several authorities in support of this position. Appellees have conceded this proposition of law but insist that the appellee believed that he had a claim for damages against appellant and that he threatened to sue appellant for such damages and that a claim existed on behalf of appellee as he believed, and even though it was doubtful still it was sufficient to support a consideration for a compromise of a doubtful claim. As appears from this record, we think that counsel for appellee are not warranted in saying that appellee believed he had a just claim against appellant for damages or that he threatened to sue appellant. The evidence shows conclusively that appellee knew that appellant was not the owner of the premises; that appellant had refused on two or three occasions to repair the premises and we do not think that appellee ever threatened to sue appellant. The evidence as appears from the record is, that appellee said to Mr. Soucy, "If you will tell me who the owner of the house is so I can sue him I will pay the rent", and the most, as we think, that this conversation shows is a threat to sue the owner of the house and not appellant. Appellant was not acting for the owner and not pretending to act for the owner but was collecting the rent for himself as trustee and we do not think that this contract in any measure released any damages or right of appellee to sue the owner of the premises if he had a valid claim against the owner. Suppose Dr. Kirsch had ascertained who the owner was and had such contract as would authorize him to sue the owner for damages, can it be said that the conversation above cited would release the owner of the property from the payment of any damages that Dr. Kirsch might have against him? The conversation by its terms does not purport to release the damages; there is nothing in the record showing Mr. Soucy could make any contract that would release or in any manner bind the owner of the property for the damages, and we are

upon his part to repair or pay the repairs and cites several authorities in support of this position. Appellees have conceded this proposition of law but insist that the appellee believed that he had a claim for damages against appellant and that he threatened to sue appellant for such damages and that a claim existed on behalf of appellee as he believed, and even though it was doubtful still it was sufficient to support a consideration for a compromise of a doubtful claim. As appears from this record, we think that counsel for appellee are not warranted in saying that appellee believed he had a just claim against appellant for damages or that he threatened to sue appellant. The evidence shows conclusively that appellee knew that appellant was not the owner of the premises; that appellant had refused on two or three occasions to repair the premises and we do not think that appellee ever threatened to sue appellant. The evidence as appears from the record is, that appellee said to Mr. Soucy, "If you will tell me who the owner of the house is so I can sue him I will pay the rent", and the most, as we think, that this conversation shows is a threat to sue the owner of the house and not appellant. Appellant was not acting for the owner and not pretending to act for the owner but was collecting the rent for himself as trustee and we do not think that this contract in any measure released any damages or right of appellee to sue the owner of the premises if he had a valid claim against the owner. Suppose Dr. Kirsch had ascertained who the owner was and had such contract as would authorize him to sue the owner for damages, can it be said that the conversation above cited would release the owner of the property from the payment of any damages that Dr. Kirsch might have against him? The conversation by its terms does not purport to release the damages; there is nothing in the record showing Mr. Soucy could make any contract that would release or in any manner bind the owner of the property for the damages, and we are

of the opinion that the arrangement above contended for by appellee as a contract releasing the damages would not in any manner bar any right that Dr. Kirsch had to sue for his damages. We recognize the principle that if one person has a claim against another that is doubtful and a compromise of such doubtful claim is effected that it constitutes a valid consideration for a settlement but we do not think that the conversation here detailed brings this case within that principle of the law or that it even amounts to a contract for releasing, as appellant had made no agreement to repair and was not in any manner liable for the repairs, and there being no liability upon his part there would be no consideration to support the supposed agreement.

We are of the opinion that the claim made by appellee ~~is~~ is not sufficient to warrant a release from the payment of any rent that may have been due to appellant upon the premises in question and that the verdict of the jury and judgment of the Court is contrary to the law and the evidence and that the judgment should be reversed and the cause remanded.

REVERSED AND REMANDED.

(To be published in abstract only.)

of the opinion that the arrangement above contended for by appellee as a contract releasing the damages would not in any manner bar any right that Dr. Hirsch had to sue for his damages. We recognize the principle that if one person has a claim against another that is doubtful and a compromise of such doubtful claim is effected that it constitutes a valid consideration for a settlement but we do not think that the conversation here detailed brings this case within that principle of the law or that it even amounts to a contract for releasing, as appellant had made no agreement to repair and was not in any manner liable for the repairs, and there being no liability upon his part there would be no consideration to support the supposed agreement.

We are of the opinion that the claim made by appellee is not sufficient to warrant a release from the payment of any rent that may have been due to appellant upon the premises in question and that the verdict of the jury and judgment of the Court is contrary to the law and the evidence and that the judgment should be reversed and the cause remanded.

REVEREND JUDGE OF THE COURT.

(To be published in abstract only.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 9<sup>th</sup> day of October, A. D. 1913.

A. C. Millspaugh  
Clerk of the Appellate Court.



# OPINION

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# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon on the Fourth Tuesday in the month of March in the year of our LORD, one thousand nine hundred and thirteen, the same being the 25th day of March, in the year of our LORD, one thousand nine hundred and thirteen.

Present:

Hon. JAMES C. McBRIDE, Presiding Justice.

Hon. OWEN P. THOMPSON, Justice.

Hon. HARRY HIGBEE, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff.

And afterwards in Vacation, after said March Term, to-wit: On the 9<sup>th</sup> day of October, A. D. 1913, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

183 I.A. 529

~~ERROR TO~~  
APPEAL FROM

183 I.A. 529

Circuit COURT

No. 57

vs.

March Term, 1913.

Saline COUNTY

Saline Co. Coal Co

TRIAL JUDGE  
Hon. A. W. Lewis



March Term, A. D. 1913.

Elsie Holcomb, Administratrix of  
the estate of Mathew A. Holcomb,  
deceased,

Appellee,

vs.

Saline County Coal Company,

Appellant.)

Appeal from the  
Circuit Court of  
Saline County.

183 I.A. 529

McBride, F.J.

The appellee, a intestate, Mathew A. Holcomb, was killed at the same time, by the tipping of the same tub and under the same circumstances as John Gwsianny, and the facts, pleadings and arguments of counsel in this case are substantially the same as the case of <sup>ante</sup> Mary Gwsianny, etc., vs. Saline County Coal Company, in which an opinion was rendered by this court at the present term thereof; in which case this court reversed the judgment of the lower court with a finding of facts. We, therefore, adopt the opinion rendered in the case of Mary Gwsianny, Administratrix, etc., vs. Saline County Coal Company as the opinion in this case, and the judgment of the lower court is reversed.

The finding of facts is the same as that in the case above referred to.

(To be published in abstract only.)

March Term, 1881.

Administratrix of  
the estate of Andrew Holcomb,  
deceased,

Appellee,

vs.

Saline County Coal Company,

Appellant.

Remanded from the  
Circuit Court of  
Saline County.

1881 A. 253

Reversed.

The appellee's evidence, Andrew N. Holcomb, was killed  
at the same time and place as the appellant, and was killed  
from a distance of some twenty feet from the latter, and  
and arguments of counsel in this case are substantially the same  
as the case of very very, etc., vs. Saline County Coal  
Company, in which an opinion was rendered by this court at the  
present term, in which case this court reversed the  
judgment of the lower court with a finding of fact, and  
forth, about the opinion rendered in the case of very, etc.,  
Administratrix, etc., vs. Saline County Coal Company, and  
opinion in this case, and the judgment of the lower court is  
reversed.

The finding of fact in the case at hand in the case

above referred to.

(To be published in official report.)



*I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.*

*IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 9<sup>th</sup> day of October, A. D. 1913.*

.....  
*Clerk of the Appellate Court.*

# OPINION

For \$

3A 5-30

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# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon on the Fourth Tuesday in the month of March in the year of our LORD, one thousand nine hundred and thirteen, the same being the 25th day of March, in the year of our LORD, one thousand nine hundred and thirteen.

Present:

Hon. JAMES C. McBRIDE, Presiding Justice.

Hon. OWEN P. THOMPSON, Justice.

Hon. HARRY HIGBEE, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff.

And afterwards in Vacation, after said March Term, to-wit: On the 9th day of October, A. D. 1913, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

183 I.A. 530

~~ERROR TO~~

APPEAL FROM

Dilton

Circuit

COURT

No. 16 vs.

March Term, 1913.

Wabash

COUNTY

Drapp

TRIAL JUDGE

Hon. Wm. H. Green



Term No. 60.

Agenda No.34.

March Term, A. D. 1913.

Mark L. Tilton,	)	
	)	
vs.	)	Appellee,
	)	
Joseph L. Trapp,	)	
	)	
	)	Appellant.)

Appeal from the  
Circuit Court of  
Wabash County.

McBride, P.J.

The plaintiff obtained judgment against the defendant for four hundred dollars. The suit was based upon the common counts to which was attached a bill of particulars, and there was filed with the declaration the contract upon which appellee seeks to recover rent, called Exhibit "B" and is in the following language:

"Mt. Carmel, Ill., March 14, 1910.

Consideration allowed for slaughter house bought of Joseph Trapp Five Thousand Three hundred Dollars (Five and no/100 \$5000.00) Note at First National Bank for Three Thousand Sixty-one Dollars given by Joe and John Trapp is to remain in their names until paid.

Joseph Trapp agrees to rent the said slaughter house of M.L. Tilton at twenty-five dollars per month, said Trapp, to run and keep all machinery in good repair at his own expense, all knives, steels and saws to be furnished by said Trapp. The twenty-five dollars as mentioned above applies only to the two shops run by himself. All pipes and machinery about the plant is to be cleaned up and given a coat of asphaltum paint or oiled where exposed to dampness.

Statement of tools and fixtures and land to be included in deal concerning ice plant and slaughter house and between M. L. Tilton and Joseph Trapp, both of Mt. Carmel, Ill., to wit;



March Term, A. D. 1913.

Mark L. Tilton,	}	Appellant.
Appellee,		
vs.		
Joseph L. Trapp,		Appellee.

Appeal from the  
Circuit Court of  
Madison County.

Exhibit A.

The plaintiff obtained judgment against the defendant for four hundred dollars. The suit was based upon the common count in which was attached a bill of particulars, and there was filed with the declaration the contract upon which judgment needs to be recovered, called Exhibit B, and is in the following tenor:

Page:

Feb. Term, Ill., March 14, 1910.

Consideration allowed for slaughter house bought of Joseph Trapp five thousand three hundred dollars (Ten and seven \$300.00) note at first National Bank for three thousand six hundred and forty dollars given by Joe and John Trapp is to remain in their name on file with.

Joseph Trapp agrees to rent the said slaughter house at \$1.00 per month of twenty-five dollars per month, said Trapp, to run and keep all machinery in good repair at his own expense, all knives, tools and saws to be furnished by said Trapp. The twenty-five dollars as mentioned above applies only to the two shops run by himself. All pipes and machinery about the plant is to be cleaned up and given a coat of repainting paint or oil where exposed to dampness.

Witness of Joe and John Trapp and of the defendant M. J. Tilton and Joseph Trapp, both of St. Charles, Ill., testify.

Land Lot No. 172, 4 acres.  
One 20 H.P. Electric Motor.  
One stock scales and one 600 lb. platform scale.  
One upright 10 H.P. Boiler.  
One ten ton cold storage machine.  
Two steam jacket kettles for lard and tallow.  
One tallow tank.  
One lard agitator.  
One enterprise sausage mill and stuffer.  
One buffalo meat chopper and mixer.  
One lot hog and beef travelers.  
One hoisting machine.  
One pump for water. One scalding vat.  
Water tanks and troughs---One set cleavers and  
three (3) saws.  
Packing house barn and sheds.

Jos. L. Trapp.  
M. L. Tilton."

To this defendant filed sworn plea denying the execution of this contract. The appellant admits his signature to the contract but claims that all preceding the words "Statement of tools and fixtures and land to be included in deal concerning ice plant, etc.," has been attached to the agreement since its execution. The original agreement was certified to this court. and upon an examination it appears that two sheets of paper had been pasted together and the part denied by appellant as having been included in the contract he signed is upon a separate sheet and the remainder is upon another sheet, each of which sheets appear to contain a contract complete within itself and without reference to the other sheet. Appellant also claims that shortly thereafter another agreement was prepared by the parties hereto and put in typewriting by appellant; that this was in duplicate and appellant and appellee signed one of them and that appellee alone signed the other, which he retained, and this contract is Exhibit "C" and is in the words and figures following, to-wit: "This agreement entered into by and between # Mark L. Tilton of one part, and Joseph L. Trapp, both of the City of Mt. Carmel, County of Wabash and State of Illinois, Witnesseth;

That the said Tilton harto-wit, on the 14th day of March,

One 20 H.P. Electric Motor.  
 One stock scales and one 800 lb. platform scale.  
 One upright 10 H.P. Boiler.  
 One ten ton cold storage machine.  
 Two steam jacket Kettles for lard and tallow.  
 One lard agitator.  
 One enterprise sausage mill and stuffer.  
 One buffalo meat chopper and mixer.  
 One lot hog and beef travelers.  
 One hoisting machine.  
 One pump for water. One scalding vat.  
 Water tanks and troughs---One set cleavers and  
 three (3) saws.  
 Packing house barn and sheds.

J. L. Tiffin.  
 J. L. Tiffin.

To His Excellency, the Governor of the State of Illinois

of this contract. The appellant admits his signature to the  
 contract but claims that all preceding the words "Statement of  
 tools and fixtures and land to be included in deal concerning  
 ice plant, etc.," has been attached to the agreement since its  
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 which sheets appear to contain a contract complete within it-  
 self and without reference to the other sheet. Appellant also  
 claims that shortly thereafter another agreement was executed  
 by the parties hereto and put in typewriting by appellant; that  
 this was in duplicate and appellant and appellee signed one of  
 them and that appellee alone signed the other, which he retained.  
 Now this contract is Exhibit "C" and is in the words and figures  
 following, to-wit: "This agreement written into by and between  
 Mark L. Tiffin of one part, and Joseph L. Tiffin, both of the  
 City of St. Charles, County of Adams and State of Illinois, do-  
 hereby:

A. D. 1910, rented his, the said Tilton's Slaughter House and cold storage plant, situated on out lot No. 172, in said City, for the sum of Twenty-five Dollars per month, payable in advance, by said Trapp, the use of said slaughter house and cold storage plant to be used only by said Trapp, for the slaughter of such animals used by himself, and does not include the operations of the cold storage plant of said plant.

Said Trapp agrees to pay to said Tilton's prices stated on envelope held by said Tilton per head for all animals slaughtered on said premises herein, in excess of those slaughtered for his, Trapp's use.

This agreement is entered into with the full understanding that same may be terminated at the end of any month, and may be extended from month to month, by agreement of both parties, and the said Trapp agrees to keep all machinery in good order, furnish his own oil, and turn all the property herein to said Tilton in as good order as when he, the said Trapp, received it, at the expiration of the within agreement.

M. L. Tilton."

That there was also prepared another agreement called Exhibit "D" and is in the words and figures following, to wit:

"I herewith agree to pay you for killing: Cattle, 1.00; calves, .50; hogs, .50; sheep, .50.

Jos. L. Trapp, March 19, 1910.

Above proposition accepted by M. L. Tilton."

The appellant denies the execution of all of these agreements and claims that immediately after the sale that appellee took possession of the property in question, placed a man by the name of Gray in charge of it and operated it for about three weeks and during that time was engaged in the slaughtering of cattle, hogs and other animals for appellee and other persons. That Gray then quit the employ of appellee and that appellant thereafter operated the plant under a verbal agreement with ap-

A. D. 1910, rented him, the said Tilton's Slaughter House and cold storage plant, situated on out lot No. 172, in said City, for the sum of twenty-five dollars per month, payable in advance, by said Trapp, the use of said slaughter house and cold storage plant to be used only by said Trapp, for the slaughtering of such animals used by himself, and does not include the operations of the cold storage plant of said plant.

Said Trapp agrees to pay to said Tilton's prices stated on envelope held by said Tilton per head for all animals slaughtered on said premises herein, in excess of those slaughtered for him, Trapp's use.

This agreement is entered into with the full understanding that same may be terminated at the end of any month, and may be extended from month to month, by agreement of both parties, and the said Trapp agrees to keep all machinery in good order, furnish his own oil, and turn all the property herein to said Tilton in as good order as when he, the said Trapp, received it, at the expiration of the within agreement.

M. J. Tilton.

That there was also between said parties, to-wit: Exhibit "D" and is in the words and figures following, to-wit: "I herewith agree to pay you for killing: Cattle, \$1.00;

Swine, .50; Hogs, .50; Sheep, .50.

Joe. L. Trapp, March 19, 1910.

Above proposition accepted by M. J. Tilton.

The appellant denies the execution of all of these agreements and claims that immediately after the sale that appellee took possession of the property in question, placed a man by the name of Gray in charge of it and operated it for about three weeks and during that time was engaged in the slaughtering of cattle, hogs and other animals for appellee and other persons. That Gray then quit the employ of appellee and that appellant thereafter operated the plant under a verbal agreement with ap-



pellee, by which appellant was to have the privilege of killing his own butcher stock and that he was to allow appellee all the money received for the killing of stock for other butchers; and denies that he agreed to pay appellee twenty-five dollars per month and half of the amount received for the killing of animals of other butchers, in excess of the \$25.00 per month, as claimed by appellee.

The only error assigned by appellant of which it is necessary for us to take notice is the one in which he claims that the verdict is contrary to the law and the evidence. The principal question of contention upon the trial of this case was as to whether or not the appellant executed the contract marked Exhibit "B" in the form in which it was presented to the jury. The appellant denied the execution of this agreement under oath and the burden of proving it to be appellant's agreement was upon appellee. We are not satisfied with the verdict of the jury upon this question under the evidence as shown in the record. It is true that appellee testifies that appellant signed the contract in its present shape. This, however, is denied by appellant and as we view it the conduct of appellee with reference to the operation of this plant is overwhelmingly opposed to his theory that at the time the trade was made he leased the plant to appellant at twenty-five dollars per month, and half of the proceeds arising from the killing of animals for other persons. It appears from the evidence that a man by the name of Gray, who had prior to that time been working for appellant, was placed in charge of this property by appellee; that appellee rented it to him for half of the amount received for the butchering of stock; while appellee concedes that he did rent it to Gray yet he claims to have done so by the direction of appellant. Baumgartner, a witness of appellee's testified, that, "Mr. Geo. Gray operated the slaughter house during the three



weeks immediately after Mr. Trapp sold it to Tilton; he was working for Mr. Trapp for a while until it changed hands. I don't know how that was. When the thing changed hands he was working for Tilton. He worked then about three weeks." That during the time that Gray was operating the plant, Benjamin Halbig also says, "I had a conversation with Mr. Tilton relative to renting the slaughter house. He came to me several times about renting it to me, ~~sell~~ or selling it to me, or getting me to rent it. He said he was not getting enough money out of it. He tried to sell it or lease it. He was up there two or three different times. They had two or three little hitch-es and it seemed he wanted to make a change and let some one else have it. He tried to get Mr. Schaffet to take it but he was not a very good man to take off the hides and we would not have our killing done there; he didn't get it and Mr. Trapp took it again. That was about one year ago." On cross examination Mr. Tilton said, "I don't remember if I went to Trapp after Gray left to get him to take it and rent it again from me. I don't remember if I did. He told me of another man here that I didn't know, that he would butcher the same way, for so much a head, but he didn't do it. I don't know who he was that I went to, to rent this after Mr. Gray left. I don't remember his name. I was not acquainted with the man. I was running it on his advice, what he told me to do." Mr. Trapp in his testimony says, that after Gray left that he had a talk with Tilton in which he said, "Well, I think our man is going to leave us, had you heard anything about it," and I said, "Yes, he told me about it," and he said, "What seems to be the trouble," and I says, "Well he is not making enough money to run it on the shares and he wants to go back, he can make more money than that." Mr. Tilton says, "I am sorry of that, he seems to be a good man and attends to his business," and I said, "yes, I would rather he

weeks immediately after Mr. Trapp sold it to Tilton; he was working for Mr. Trapp for a while until it changed hands. I don't know how that was. When the thing changed hands he was working for Tilton. He worked then about three weeks. "That during the time that Gray was operating the plant, Benjamin Hain- big also says, "I had a conversation with Mr. Tilton relative to renting the slaughter house. He came to me several times about renting it to me, sell or selling it to me, or getting me to rent it. He said he was not getting enough money out of it. He tried to sell it or lease it. He was up there two or three different times. They had two or three little hitch- es and it seemed he wanted to make a change and let some one else have it. He tried to get Mr. Behrler to take it but he was not a very good man to take off the ladies and we would not have our killing done there; he didn't get it and Mr. Trapp took it again. That was about the year 1900. "Mr. Tilton said, "I don't remember if I went to Trapp after Gray left to get him to take it and rent it again from me. I don't remember if I did. He told me of another man near that I didn't know, that he would butcher the same way, for so much a head, but he didn't do it. I don't know who he was that I went to, to rent this after Mr. Gray left. I don't remember his name. I was not acquainted with the man. I was running it on his advice, what he told me to do." Mr. Trapp in his testi- mony says, "That after Gray left that he had a talk with Tilton in which he said, "Well, I think you can do better by having me had you think about it." and I said, "Yes, he told me about it." and he said, "That seems to be the business." and I said, "Well he is not making enough money to run it on the same way he was to go back, he was with me many times." and Tilton says, "I am sure of that. He seems to be a good man and attends to his business." and I said, "Yes, I would rather



would stay," and he says, "What will we do about it, we will have to get some one to run it," and I said, "I guess we will," and I said, "I will make you a proposition, I will take the slaughter house and run it and do my killing and Mr. Dunkle's and Mr. Halbig's, and you collect for their killing, you collect it for whatever the killing amounts to for the rent and I will do the work myself," that was about half, my killing amounts to about as much as Mr. Dunkle's and Mr. Halbig's both. Mr. Tilton says, "That is <sup>al</sup> - right," and we went ahead that way about eight months, and one day Mr. Tilton came to me, it was ~~down~~, if I remember, where Dr. Utter has his office, and says, "It is not making me enough money the way it is running and I have to have twenty-five dollars a month for it," and I said, "I am sorry I cannot give you any more than I agreed to," and he said, "I will have to have more," and I said, "You will have to look otherwise, that is until the following spring." And this conversation is not denied by Mr. Tilton. It also appears from the testimony of Mr. Hochgeiger, the Circuit Clerk that when Mr. Tilton first filed this suit that he filed with it the lower part of this agreement, being the part admitted by appellant that he signed. That sometime thereafter, and just before court convened, Mr. Tilton again came to the office and took the papers over to Mr. Green's office, as he says, for the purpose of preparing a declaration, and they took this contract and that when he returned it there was attached to the contract the upper part, being the part denied by appellant that was on it at the time of its execution; and this is not denied or in any manner explained by appellee. Appellee says that this contract was executed down at the meat market, which is denied by appellant. And the paper appears to have been written upon the letter heads of the Merchants Hotel of Mt. Carmel. Appellee further says, "This paper was just alike and I cut that off and pasted it on. I cannot tell the time of day I did that. It was



would say, "and he says, 'I will give you a receipt for the  
 have to get some one to run it," and I said, "I guess we will,  
 and I said, "I will give you a receipt for the  
 slaughter house and run it and carry killing and Mr. Dunkle's  
 and Mr. Halbig's, and you collect for their killing, you col-  
 lect it for whatever the killing amounts to for the rent and  
 I will do the work myself," that was about half, my killing  
 amounts to about as much as Mr. Dunkle's and Mr. Halbig's -  
 Mr. Tilton says, "that is right," and we went ahead the way  
 about eight months, and one day Mr. Tilton came to me, it was  
 day, it is something, when Mr. Tilton was at the office, and says,  
 "it is not right, he is making money the way it is running and I  
 have to have some thing better," and I said,  
 "I am sorry I cannot give you any more than I agreed to," and  
 he said, "I will have to have more," and I said, "I will  
 have to look otherwise, that is until the following spring."  
 and this conversation is not denied by Mr. Tilton. It also  
 appears from the testimony of Mr. Hooker, the Circuit Clerk  
 that when Mr. Tilton first filed this bill that he filed with  
 it the lower part of this agreement, being the part relating to  
 the lower part of the bill. That question is settled, and that  
 before court convened, Mr. Tilton again came to the office and  
 sent the papers over to Mr. Green's office, as he says, for the  
 purpose of getting a decision, and they took this contract  
 and that was as returned it there and returned to the court  
 the upper part, being the part denied by respondent that was on  
 it at the time of the decision, and this is not denied by  
 any person examined by applicant, excepting what that the  
 lower was executed some time after the first meeting, when it was  
 executed. And the paper which is now being tried upon the  
 lower part of the contract is not the contract which was  
 returned to the court, and I say that I am not sure it was  
 passed is not. I cannot tell the time at any time that it was

not done since the first day of last July, this year." It seems to us in the face of the testimony of the Circuit Clerk, who appears to have had a distinct remembrance with reference to this paper, that the upper part was not attached to the agreement at the time it was first filed in his office, and that in the meantime it was taken out and returned with this attached to it, together with the continued efforts of appellee to rent this property to different persons, and the fact that he rented it to Gray and he and Gray apparently worked together to advance the business, are all circumstances that strongly corroborate the testimony of the appellant in his denial of the execution of this instrument; there is nothing in this record that in any manner tends to discredit the testimony of the appellant and we can see no reason why his testimony is not entitled to at least as much credit as that of appellee, and with these facts and circumstances so strongly corroborating appellant we are convinced that the jury was in some manner misled in the rendering of their verdict in this case. Taking the testimony of appellee in connection with the undisputed testimony of other witnesses, and the conduct of appellee, we are impelled to the belief that the jury was not warranted in finding a verdict for appellee in this case. *Podolski vs. Stone*-- 186 Ill., 540. The judgment of the Court is reversed and the cause remanded.

REVERSED AND REMANDED.

(To be published in abstract only.)

not done since the first day of last July, this year." It seems to us in the face of the testimony of the Circuit Clerk, who appears to have had a distinct remembrance with reference to this paper, that the upper part was not attached to the paper sent at the time it was first filed in this court, and that at the meantime it was taken out and returned with this attached to it, together with the continued efforts of appellee to rent this property to different persons, and the fact that he rented it to Gray and he and Gray apparently worked together to advance the business, are all circumstances that strongly corroborate the testimony of the appellant in his denial of the execution of this instrument; there is nothing in this record that in any manner tends to discredit the testimony of the appellant and we can see no reason why his testimony is not entitled to at least as much credit as that of appellee, and with these facts and circumstances as strongly corroborating appellant we are convinced that the jury was in some manner misled in the rendering of their verdict in this case. Taking the testimony of appellee in connection with the undisputed testimony of other witnesses, and the conduct of appellee, we are impelled to the belief that the jury was not warranted in finding a verdict for appellee in this case. Judgment reversed and the cause remanded.

RECEIVED AND RETURNED

(To be published in abstract only.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 9th day of October, A. D. 1913.

*A. C. Millspaugh*

Clerk of the Appellate Court.

# OPINION

*For the*

---

1871



Reynolds v. Davis No. 538

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon on the Fourth Tuesday in the month of March in the year of our LORD, one thousand nine hundred and thirteen, the same being the 25th day of March, in the year of our LORD, one thousand nine hundred and thirteen.

Present:

Hon. JAMES C. McBRIDE, Presiding Justice.

Hon. OWEN P. THOMPSON, Justice.

Hon. HARRY HIGBEE, Justice.

A. C. MILLSPAUGH, Clerk.

351

W. S. PAYNE, Sheriff.

And afterwards in Vacation, after said March Term, to-wit: On the 7th day of October, A. D. 1913, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

183 I.A. 538

Reynolds

ERROR TO  
APPEAL FROM

No. 64 vs.

Circuit COURT

March Term, 1913.

Mason COUNTY

Atton, Granite &  
St Louis Ice Co

TRIAL JUDGE  
Hon. W.E. Hadley





March Term, A. D. 1913.

Appeal from the  
Circuit Court of  
Madison County.

Joseph C. Reynolds,  
Appellee,  
vs.  
Alton Granite City & St. Louis  
Traction Company,  
Appellant.

1831 A. 588

Reynolds, J. C.

This is an appeal from Madison County Circuit Court, where-  
in the appellant seeks to reverse a judgment for six hundred  
dollars that appellee recovered against it. The appellant was  
engaged in the business of operating street cars through the  
village of Madison and appellee claims that on the evening of  
April 3rd, 1912, he was injured by one of appellant's cars at the  
intersection of Second Street and Madison Ave. Madison Avenue  
runs through the village of Madison, substantially north and  
south and is intersected at right angles by parallel streets  
about three hundred feet apart, which, beginning at the south  
end and proceeding northerly are numbered second, third and fourth  
streets. There is a street railway track upon second street  
which turns into Madison Avenue at their intersection and con-  
tinues northerly; at a distance of about three hundred feet  
westerly from Madison Avenue there is a parallel electric rail-  
road known as the Illinois Traction system of the McKinley line,  
which is operated upon a street designated as "G" Street,  
and crosses third street at a point designated in the evidence  
as Third and "G" streets. On the evening of April 3rd at about  
8:15 o'clock, appellee left his home about four blocks east of  
Madison Avenue on Fourth Street, walked west to Madison Avenue  
and thence south to the intersection of Second Street and Mad-  
ison Avenue. The witness is taking a north-south line and  
was Avenue. The witness is taking a north-south line and

the time he reached the intersection of Madison Avenue and Second Street a car turned from Second Street into Madison Avenue going north and stopped. That there were two ladies waiting to take passage upon this car and that they boarded the car, and about the time that they got upon the car appellee grabbed hold of the handle of the car for the purpose of getting on but the car started suddenly and his foot slipped from the step and he was jerked and thrown in such a manner as to cause his foot to go under the car and his right foot to be crushed by the wheel. He gave no signal to either the motor-man or conductor and does not think any one about the car saw him and it is claimed by him that this accident happened about forty feet north of the north line of Second Street and about opposite the office of Doctor Kiser; that almost immediately appellee went to Doctor Kiser's office but was informed by Mrs. Kiser that the Doctor was not at home; he then left Doctor Kiser's office and went north on Madison Avenue to Third Street and west on the north side of Third Street to the office of Doctor Ham but his office was also closed and appellee then walked over to the McKinley line for the purpose of taking a car to the hospital at Granite City; that he had to wait a few minutes for a car and that while waiting two gentlemen and a lady came there for the purpose of taking a car and appellee stopped south about the middle of Third street waiting the approach of the car. It is claimed by appellant that as this car approached the crossing on third street appellee either fell under the car, or lay down under the car as some of the witnesses put it, as they say the car ran over his foot and that he made an outcry. Appellee, however, states that as this McKinley car came up the headlight blinded him and he became dizzy and fainted and fell down near the car but says that the car did not run over him. Appellee was then picked up by some of the bystanders and carried to the doctor's office in the vicinity and



the time he reached the intersection of Madison Avenue and Second Street a car turned from Second Street into Madison Avenue going north and stopped. That there were two ladies waiting to take passage upon this car and that they boarded the car, and about the time that they got upon the car appellant grabbed hold of the handle of the car for the purpose of getting on but the car started suddenly and his foot slipped from the step and he was jerked and thrown in such a manner as to cause his foot to go under the car and his right foot to be crushed by the wheel. He gave no signal to either the motor-man or conductor and does not think any one about the car saw him and it is claimed by him that this accident happened about forty feet north of the north line of Second Street and about opposite the office of Doctor Miser; that almost immediately appellant went to Doctor Miser's office but was informed by Dr. Miser that the Doctor was not at home; he then left Dr. Miser's office and went north on Madison Avenue to Third Street and went on the north side of Third Street to the office of Doctor Miser and his office was also closed and appellant then walked over to the McKinley line for the purpose of taking a car to the hospital at Granite City; that he had to wait a few minutes for a car and that while waiting two gentlemen and a lady came there for the purpose of taking a car and appellant stopped south about the middle of Third Street waiting the approach of the car. It is claimed by appellant that as this car approached the crossing on Third Street appellant stepped under the car, or lay down under the car as some of the witnesses put it, as they say the car ran over his foot and that he made an outcry. Appellant, however, states that as this car came up the headlight blinded him and he became dizzy and fainted and fell down near the car but says that the car did not run over him. Appellant was then picked up by some of the bystanders and carried to the doctor's office in the vicinity and

was thence taken to the hospital at Granite City where his wound was dressed and later his foot was amputated and later still a second amputation was made which caused appellee to lose his foot at the ankle.

The declaration in this case contains two counts. The first count alleges that the plaintiff at second and Madison streets in the village of Madison became a passenger on a car of defendant to be carried on said car for a reward. That while plaintiff with due care and diligence was about to get on said car the defendant carelessly and negligently caused said car to be suddenly and violently started and moved, that thereby plaintiff was with great force and violence thrown with great force under said car and his foot crushed.

The second count alleges that the appellee was desirous of becoming a passenger upon one of defendant's cars upon Second and Madison streets, a place where passengers were received and discharged. That defendants ran one of their cars up to Second and Madison streets and stopped the car for the purpose of taking passengers on said car; that other passengers were then and there taken on said car and that plaintiff was using due diligence to get on the car but before he could do so the defendant not regarding its duty in that behalf to stop said car a reasonable time to enable all of said passengers to safely get aboard the same, suddenly, carelessly, negligently and violently started its car while plaintiff with due care and diligence was attempting to get on the same, whereby plaintiff was then and there thrown with great force and violence under the car and by means thereof his right foot was crushed, etc.

Several errors have been assigned by appellant. With the view we take of this case the only assignment of error necessary for us to consider is the refusal of the court to set aside the verdict and grant a new trial. As it will be necessary to re-

was shown taken in the hospital and that it was the same  
was dressed and later his foot was amputated and later still a  
second amputation was made which caused injuries to lose his  
foot at the ankle.  
The defendant in this case was a woman, the  
first count alleges that the plaintiff at second and Madison  
streets in the village of Madison became a passenger on a car of  
defendant to be carried on said car for a reward. That while  
plaintiff with due care and diligence was about to get on said  
car the defendant carelessly and negligently caused said car to  
be suddenly and violently started and moved, that thereby plaintiff  
fell and with great force and violence between said street  
and said car and his foot crashed.  
The second count alleges that the plaintiff was injured  
of becoming a passenger upon one of defendant's cars upon second  
and Madison streets, a place where passengers were received  
and discharged. That defendant ran one of their cars up to  
second and Madison streets and stopped the car for the purpose  
of taking passengers on said car and that defendant was  
then and there before plaintiff and that plaintiff was on the  
car and defendant failed on the car to take care to see that  
defendant not regarding the duty to take care to see that  
a technician that he enable all of said passengers to safely  
board the car, negligently, carelessly, recklessly and  
without due care and diligence with due care and diligence was  
attempting to get on the car, whereby plaintiff was injured  
thereby with force and violence and with intent to injure  
and without any lawful excuse or justification.  
Several exceptions were taken by defendant to the  
view and take of this case the only assignment of error necessary  
for us to consider is the refusal of the court to set aside the  
verdict and grant a new trial. As it will be necessary to re-

verse this case because of improper instructions given on behalf of the plaintiff, we will refrain from commenting upon the evidence, except so far as is necessary to show that the instruction given was improper.

The appellee claims that he was about to get aboard of appellant's car at or near the intersection of Second and Madison streets and that about the time he placed his foot upon the top step of the car it started suddenly and with great force threw him under the car wheel and mashed his foot. Appellant contends that this car did not stop at second and Madison streets to receive passengers and that appellee undertook to get upon the car while it was in motion and fell. And appellant further contends that appellee was not hurt at this place but that while over at the intersection of Third and "G" streets he was run over and injured by a car of the McKinley line. The appellee testifies that he was injured by reason of a car starting suddenly at Second and Madison Streets, that he immediately went to Doctor Kiser's office opposite the place where he was hurt and ~~injured~~ inquired for Doctor Kiser and was informed by Doctor Kiser's wife that the doctor was away from home and that he there told her that a car had run over his foot and mashed it and that was what he wanted with the doctor. Appellee then traveled north about three hundred feet to the intersection of Third street and Madison Avenue, thence west near to "G" street, and there found the office of Doctor Ham was closed and that he then went to "G" street to wait for a McKinley car and while waiting for a McKinley car he fainted, that his foot went in close to the track but not under the car and that he was then taken to Doctor Ham's office and from there to the hospital. A lady who was visiting at Doctor Kiser's testified that after appellee started west on Third Street she saw him passing a light and that he appeared to be dragging one of his feet. The evidence of appellant tends to show that if appellee was injured at Second street that it was



Attention given was bestowed.

The expelled claims that he was about to get aboard of an  
Bellini's car at or near the intersection of Second and Madison  
streets and that about the time he placed his foot upon the step  
of the car it started suddenly and with great force threw  
him under the car wheel and mangled his foot. Appelhoff contends  
that this was his first view of second and Madison streets as he  
was passing them and that another witness is not near the spot  
while it was in motion and left. The appellant further contended  
that another was not hurt at this place but that while there at  
the intersection of Third and Second streets he was run over and  
injured by a car at the McKinley Hotel. The appellee testified  
that he was injured by reason of a car starting suddenly at  
Second and Madison Streets. That he immediately went to Doctor  
Kline's office opposite the place where he was hit and requested  
assistance for Doctor Kline and was taken to Doctor Kline's  
office and doctor ran away from him and that he later found  
her that a car had run over his foot and mangled it and that was  
what he wanted with the doctor. Appellee then traveled north  
about three hundred feet to the intersection of Third Street and  
Madison Avenue. Thence went west to "C" street, and thence down  
the office of Doctor Han was closed and that he then went to "B"  
street to wait for a McKinley car and while waiting for a McKin-  
ley car he waited. That his foot went in close to the track but  
not under the car and that he was then taken to doctor Kline's of-  
fice and from there to the hospital. A lady who was visiting at  
Doctor Kline's testified that after appellee stayed there on  
Third Street she saw him receive a light kick from a woman  
in the distance one of his legs. The witness also testified that  
he knew that it happened and believed at present stated that it was



not on account of the car suddenly starting at Second and Madison streets but that he ran to catch the car while it was in motion and fell under the car and injured himself, and in support of this proposition the appellant offers the testimony of the conductor and motorman who testified that this car did not stop at all at the intersection of Second and Madison streets; also that the car would not start suddenly, as claimed, because it is equipped with an automator attached to the controller which prevents the motorman from turning it on rapidly but prevents it from being turned only one point at a time so that the car could not be started very suddenly. It also offered the testimony of Doctor Scott who says that appellee told him that he was hurt at the intersection of Second and Madison streets but that he was running to catch a street car and fell, and this, Doctor Scott says he reported to the Company that night; and the conductor and motorman say that they knew the next day that there was a claim that the accident happened at the crossing of Second and Madison streets. Appellant also offers the testimony of Frank Schumaker, an adjuster for the Travelers Insurance Company, with which Company appellee was carrying an accident policy, and he says when he questioned appellee of the circumstances under which he got hurt, says that appellee told him, "That as he neared Second and Madison Avenue the car made a turn around the curve and he made a run for it. I then asked him whether the conductor or motorman had seen him and he said, no, the car didn't stop and he didn't think they had seen him. He didn't see either of them, He said he got hold of the handle of the car to get on and it was going faster than he anticipated and it jerked him forward and he fell and his foot went under the hind truck and was crushed." Appellant also claims that appellee's foot was crushed by a McKinley car at the crossing of Third and "G" streets; and J. S. Keyton, Mrs. J. S. Keyton, residents of Benld, who were there waiting for a car

and an account of the car suddenly starting to move and then  
from inside but that he was to enter the car while it was in  
motion and left under the car and entered himself, and in con-  
flict of this proposition the agent offered the testimony of  
the conductor and witnesses who testified that this car did not  
stop at all at the intersection of Second and Madison streets;  
also that the car would not start suddenly, as claimed, be-  
cause it is equipped with an accelerator attached to the control-  
ler which prevents the motor from starting in an ordinary way  
except after it has been turned only one point at a time so that  
the car could not be started very suddenly. It also offered the  
testimony of Doctor Scott who says that he never told him that  
he was hurt at the intersection of Second and Madison streets  
but that he was running to catch a street car and fell, and  
this, Doctor Scott says he noticed in the Company that night;  
and the conductor and witnesses say that they knew the next day  
that there was a claim that the accident happened at the inter-  
section of Second and Madison streets, although they offered the  
testimony of Frank Conkles, an adjuster for the Traveling In-  
surance Company, with which Conkles was carrying  
an accident policy, and he says when he questioned several of  
the circumstances under which he got hurt, says that question  
said him, "That as he moved Second and Madison streets he was  
made a turn around the curve and he made a run for it." Then  
asked him whether the conductor or witnesses had told him that he  
said, no, the car didn't stop and he didn't think that was the  
claim. He didn't see either of them, he said he got hurt at the  
middle of the car to get on and it was some time before he  
anticipated and it jerked him forward and he fell and his foot  
went under the hind truck and was crushed. He offered the  
claim that several feet west of the intersection of Second and  
Madison streets he was standing on the sidewalk, and he was  
in the residence of Benid, who was there with the car

on the McKinley line say that as the McKinley car came up that appellee who was standing south of them and near the middle of the street, seemed to fall down or lay down, and that he got completely under the car where the car had passed over him, and that appellee then got up and remarked, "That is a hell of a way to do, run over a man and leave him"; that he then said he fainted and went under the car. And about the same time Fannie Stevenson living near there heard some one halloo and say "My foot is mashed off", or something to that effect; and Mrs. Callahan, another neighbor, testified that she heard some one scream and right away saw them bringing a man into Doctor Ham's office. Ray Rodshire, a grocery clerk, testified that he was coming in upon this McKinley car at the time and jumped off in the center of the street and that about that time the car passed over a man and when the car started on the man cried out, "Stop the car, my God they cut my foot off and now they wont wait for me." It will be observed from this testimony that there was a very sharp conflict as to whether appellee was injured at the intersection of second and Madison Streets or at the intersection of Third and ~~222~~ "G" Streets, or whether he was injured by attempting to jump on the car between Second and Third Streets.

At the close of the trial, the court, at the request of appellee gave the following instruction: "The court instructs the jury that it is the duty of common carriers of persons, by and through their motormen and conductors, to stop their cars for a sufficient length of time to permit persons who are about to take passage on their cars to get aboard their cars in safety, and if you believe from the evidence in this case that the plaintiff Joseph C. Reynolds, was at a regular stopping place of said defendant at Second and Madison streets in the village of Madison on the evening of April 3rd, 1912, and was then and there about to get on said car for the purpose of becoming a passenger, and if you further find from the evidence that said car was stopped

on the McKinley line say that as the McKinley car came up that appellee who was standing south of them and near the middle of the street, seemed to fall down or lay down, and that he got completely under the car where the car had passed over him, and that appellee then got up and remarked, "That is a hell of a way to die, you were a son and I was a son-in-law"; that he then said he fainted and went under the car. And about the same time James Stevenson living near there heard some one halloo and say "My foot is mashed off", or something to that effect; and Mrs. Callahan, another neighbor, testified that she heard some one scream and right away saw them bringing a man into Doctor Hart's office. Ray Hoshart, a grocery clerk, testified that he was coming in upon this McKinley car at the time and jumped off in the center of the street and that about that time the car passed over a man and when the car started on the man cried out, "Stop the car, my God they cut my foot off and now they want to kill me." It will be observed from this testimony that there was a very sharp conflict as to whether appellee was injured at the intersection of second and Madison streets or at the intersection of Third and "C" streets, or whether he was injured by attempting to jump on the car between Second and Third streets.

At the close of the trial, the court, at the request of appellee gave the following instruction: "The court instructs the jury that it is the duty of common carriers of persons, by and through their motormen and conductors, to stop their cars for a sufficient length of time to permit persons who are about to take passage on their cars to get aboard their cars in safety, and it was held that the evidence in this case was that the defendant, T. Reynolds, was at a regular stopping place at said intersection of Second and Madison streets in the village of Collins on the evening of April 2nd, 1917, and that he and his motorman got on said car for the purpose of departing - defendant, Reynolds, further find from the evidence that said car was stopped



and by and through the negligence of the motorman and conductor then operating the same was not stopped a sufficient length of time to permit the plaintiff to safely get aboard the said car, while in the exercise of due care and diligence, and if you find from the evidence that the car was negligently started without giving plaintiff a reasonable length of time to get aboard said car at such time and place, then the court instructs the jury you should find the defendant guilty." It is contended by counsel for appellant that as this was an instruction directing a verdict it should have included all of the elements necessary to have <sup>been</sup> proven by the plaintiff, and the point is made that it omits the element of having been injured at Second and Madison street. It will be observed that this instruction directs a verdict for the plaintiff, if it appears from the evidence that the car was negligently started without giving the plaintiff a reasonable length of time to get aboard said car, without reference to the question as to whether or not he was injured at that time and place, and in view of the evidence of appellant showing the injury may have occurred at another time and place, we believe that the giving of this instruction was reversible error. It is said by counsel for appellee that the whole series of instructions given for appellants center the thoughts of the jury upon the one idea that appellee must prove his case as alleged in his declaration, and that by the several instructions they have charged and cautioned to find the defendant not guilty unless each and every material allegation of the declaration was proven, and insists that this is only a technicality and the jury could not have been misled by it. In view of the character of the evidence offered in this case we believe that the instructions should have been accurate. It is said in the case of St. Louis & S. W. Ry. Co. vs. Britz, 72 Ill., 261, "An instruction which assumes, as this does, to be in itself, a complete statement of a case which,



then operating the same was not stopped a sufficient length of time to permit the plaintiff to safely get aboard the said car, while in the exercise of due care and diligence, and it further from the evidence that the car was negligently started without giving plaintiff a reasonable length of time to get aboard said car at such time and place, than the court directs the jury to should find the defendant guilty." It is contended by counsel for appellant that as this was an instruction directing a verdict it should have included all of the elements necessary to have been proven by the plaintiff, and the point is made that it omits the element of having been injured at Second and Madison Street. It will be observed that this instruction directs a verdict for the plaintiff, if it appears from the evidence that the car was negligently started without giving the plaintiff a reasonable length of time to get aboard said car, without reference to the question as to whether or not he was injured at that time and place, and in view of the evidence of appellant showing the injury may have occurred at another time and place, we believe that the giving of this instruction was reversible error. It is said by counsel for appellee that the above answer to question three gives the opportunity to the jury to determine the fact that appellee would prove the case as alleged in his declaration, and that by the several instructions they were cautioned to find the defendant not guilty unless each and every material allegation of the declaration was proven, and insists that this is only a technicality and the jury could not have been misled by it. In view of the character of the evidence offered in this case we believe that the instructions should have been reversed. It is said by counsel for appellee that Ex. Co., vs. Miller, 76 Ill. 281, An Instruction which directed the jury to find the defendant liable if the plaintiff had been injured at a given place, in the absence of other evidence, was reversible error.

under the law, entitles a party to recover, must state fully all that need be proved, so that, if there were no other evidence, there could be no question as to the rights of the parties. The language of the instruction warranted the jury in laying aside all other instructions, and considering the case upon it alone, and this they doubtless did."

In the case of *Pardridge vs. Cutler*, 168 Ill., 510, the court says, "Here was an instruction substantially directing a verdict regardless of defenses which there was evidence fairly tending to prove, and the error in an instruction is not obviated by giving conflicting instructions." And this doctrine is fully sustained in the case of *Swiercz vs. Ill. Steel Co.*, 231 Ill., 456, and many other cases to which reference could be made. •

In view of the character of evidence introduced upon the trial of this cause, and especially the conflict as to where the injury occurred, we are of the opinion that justice demands a trial by another jury, under proper instructions.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

(To be published in abstract only.)

under the law, entitled a party to recover, must state fully all that need be proved, so that, if there were no other evidence, there could be no question as to the rights of the parties. The language of the instruction warranted the jury in laying aside all other instructions, and considering the case upon it alone, and this they doubtless did."

In the case of *Partridge vs. Cutler*, 188 Ill., 210, the court says, "There was an instruction substantially as follows: 'The plaintiff is entitled to recover if he proves that the defendant is not entitled to recover, and the error in no instruction is not availed by a plain and intelligible instruction.' And this doctrine is fully sustained in the case of *Switzer vs. Ill. Steel Co.*, 231 Ill., 400, and many other cases in which reference could be made."

In view of the character of evidence introduced upon the trial of this cause, and especially the conflict as to where the injury occurred, we are of the opinion that justice demands a trial by another jury, under proper instructions. The judgment is reversed and the cause remanded.

Reversed on all points.

(To be published in abstract only.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 9<sup>th</sup> day of October, A. D. 1913.

A. C. Millspaugh

Clerk of the Appellate Court.

# OPINION

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# OPINION

Fee \$ .....

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 9th day of October, A. D. 1913.

A. C. Millspaugh  
Clerk of the Appellate Court.

to the guaranty and their signatures to other papers in evidence  
hence admitted to be genuine, that the jury should have the  
to compare the same and to use the signatures attached to the  
guaranty unhesitatingly in such examination, for the purpose  
ascertaining whether they were genuine or not. This instruction  
described as a statement of fact right and in our opinion the  
of it, was reversible error.

Now the reasons above indicated the judgment of the court  
below will be reversed and the cause remanded.  
Reversed and remanded.

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(To be published in abstract only.)

to the guaranty and their signatures to other papers in evidence admitted to be genuine, that the jury should have the right to compare the same and to use the signatures attached to the guaranty unrestrictedly in such examination, for the purpose of ascertaining whether they were genuine or not. This instruction deprived appellant of that right and in our opinion the giving of it, was reversible error.

For the reasons above indicated the judgment of the court below will be reversed and the cause remanded.

Reversed and remanded.

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(To be published in abstract only.)

derived from all the evidence that such witness had knowingly and intentionally testified falsely and was not corroborated by the matters testified to by him and that if they found that witness had knowingly and willfully testified falsely as to material matter in the case, they were at liberty to disregard the testimony of such witness entirely, except in so far as had been corroborated by other credible evidence or facts and circumstances in proof in the case. Taking into consideration all these circumstances and in addition thereto, the fact that this case was so close upon the facts, we are led to the conclusion that it was error to admit the evidence of Mrs. Mount. Instruction No. 10 given for appellees, was as follows: "You are instructed that the contract in evidence in this case and the names of the defendants on the same, are no evidence of the fact that the said defendants or either of them, signed the contract and you would not be warranted in concluding that such signatures appear on said contract as any evidence that the said defendants, did in fact, sign said contract, unless the fact from a preponderance of all the evidence and circumstances given on the trial, that the said defendants did actually sign said contract." The effect of this instruction was misleading and tended to wholly deprive appellant of the contract, guaranty and names attached thereto as a proper force in establishing the fact that such signatures were the genuine signatures of appellees.

It is a well settled rule of law in this state, that when signatures or signatures admitted as genuine, are introduced in the case, comparisons may be made by the jury, either with the signatures of the parties, with the signatures of the parties, or with the signatures of the parties, as shown in the case, *People v. ...*

In this case it was especially important to appellant to the establishment of the genuineness of the signatures of appellees.



lieved from all the evidence that such witness had knowingly and intentionally testified falsely and was not corroborated the matters testified to by him and that if they found that a witness had knowingly and wilfully testified falsely as to a material matter in the case, they were at liberty to disregard the testimony of such witness entirely, except in so far as it had been corroborated by other credible evidence or facts and circumstances in proof in the case. Taking into consideration all these circumstances and in addition thereto, the fact that this case was so close upon the facts, we are led to the conclusion that it was error to admit the evidence of Mrs. Mount.

Instruction No. 10 given for appellees, was as follows: "You are instructed that the contract in evidence in this case and the names of the defendants on the same, are no evidence of the fact that the said defendants or either of them, signed said contract and you would not be warranted in considering the fact that such signatures appear on said contract as any evidence that the said defendants, did in fact, sign said contract, unless you further find from a preponderance of all the evidence and circumstances proven on the trial, that the said defendants did actually sign said contract." The effect of this instruction was misleading and tended to wholly deprive appellant of the use of the contract, guaranty and names attached thereto as a probative force in establishing the fact that such signatures were really the genuine signatures of appellees.

It is a well settled rule of law in this state, that when other writings or signatures admitted to be genuine, are already in the case, comparisons may be made by the jury, either with or without experts of such signatures, with the signature or signatures in question, to assist in determining the genuineness of the latter. *Stitzel v. Miller*, 250 Ill., 72; *Craig v. Trotter* 252 Ill., 228.

In this case it was especially important to appellant owing to the striking similarity between the signatures of appellees,



the same with what purported to be the names of appellees attached to the guaranty. Vaughn then entered upon the business contemplated by the contract and finally became indebted to appellant in the sum of \$639.50. Judgment was taken against him for the amount due and not being paid, this suit was brought, appellant to the November term, 1911, of the circuit court of Johnson County, against appellees, to recover that amount and the guaranty.

On the trial, Vaughn testified that both appellees signed the guaranty in his presence when presented with the same, by him and stated with particularity, the circumstances under which the signatures were made.

On the other hand both Mount and Morgan testified that they had never signed the guaranty and each for himself repudiated his purported signature attached to the same. Several instruments in writing shown to have been signed by appellees, including the affidavits made by them in connection with the pleadings to which their signatures were attached, were introduced in evidence. These papers were permitted to go to the jury in order that the signatures might be compared and the originals of the same have been certified to this court for our inspection. Certain letters written by appellee Morgan to appellant, were also introduced in evidence as tending to corroborate Vaughn's statement that Morgan had signed the guaranty. Appellee Mount, while denying his signature of the guaranty, stated that about the time it purports to have been executed, his wife, at his request, wrote out and signed his name to a recommendation of Vaughn, speaking of him in high terms and sent the same to appellant. We refer to the facts only for the purpose of showing the nature of the case and that upon the proofs, the case was an exceedingly close one.

On the trial Bell Mount, wife of appellee T. B. Mount, was offered as a witness to prove that at about the time the guaranty

March Term, A. D. 1913.

Appeal from Johnson.

W. T. Rawleigh Medical  
Company,  
vs.  
T. H. Mount, et al.,  
Appellants.

1831.A. 339

Opinion by Hughes, J.

This was a suit brought by appellant against W. T. Rawleigh and Dick Morgan, appellees, as guarantors of a contract entered into with it by W. E. Vaughn. Appellees filed pleas of the trial issue and also denied under oath their purported signature to the guaranty. Upon the trial the jury found the issue in favor of appellees and judgment was entered against appellant for costs. Appellant has brought the record to this court in review, relying on its claim that the verdict was not sustained by the facts; that incompetent evidence was admitted on behalf of appellees and that the court erred in giving certain of appellees' instructions.

The proofs disclosed the following facts bearing upon the case: In May, 1908, W. E. Vaughn made arrangements to sell incense, stock foods and other goods manufactured and put up by it. In pursuance of said arrangement, appellant sent a contract, executed by it to Vaughn to be signed by him. This contract there was attached the following printed guaranty: "In consideration of the W. T. Rawleigh Medical Company extending credit to the above named person, we hereby guarantee to the said person and severally the honest and faithful performance of the said contract by him, waiving acceptance and all notice, and giving any extension of time or change of territory shall not release from liability hereon." Vaughn signed the contract himself and returned it to appellees to sign the guaranty and return



March Term, A. D. 1913.

The W.T. Rawleigh Medical  
Company,

Appellant,

vs.

T. B. Mount, et al.,

Appellees.

Appeal from Johnson.

183 I.A. 539

Opinion by Higbee, J.

This was a suit brought by appellant against T. B. Mount and Dick Morgan, appellees, as guarantors of a contract entered into with it by W. E. Vaughn. Appellees filed pleas of the general issue and also denied under oath their purported signature to the guaranty. Upon the trial the jury found the issues in favor of appellees and judgment was entered against appellant for costs. Appellant has brought the record to this court for review, relying on its claim that the verdict was not sustained by the proofs; that incompetent evidence was admitted on behalf of appellees and that the court erred in giving certain of appellees' instructions.

The proofs disclosed the following facts bearing upon the case: In May, 1908, W. E. Vaughn made arrangements to sell medicines, stock foods and other goods manufactured and put up by it. In pursuance of said arrangement, appellant sent a printed contract, executed by it to Vaughn to be signed by him. To this contract there was attached the following printed guaranty: "In consideration of the W. T. Rawleigh Medical Company extending credit to the above named person, we hereby guarantee to <sup>it</sup> jointly and severally the honest and faithful performance of the said contract by him, waiving acceptance and all notice, and agree that any extension of time or change of territory shall not release us from liability hereon." Vaughn signed the contract himself, procured, as he claims, appellees to sign the guaranty and returned





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# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon on the Fourth Tuesday in the month of March in the year of our LORD, one thousand nine hundred and thirteen, the same being the 25th day of March, in the year of our LORD, one thousand nine hundred and thirteen.

Present:

Hon. JAMES C. McBRIDE, Presiding Justice.

Hon. OWEN P. THOMPSON, Justice.

Hon. HARRY HIGBEE, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff.

And afterwards in Vacation, after said March Term, to-wit: On the 9th day of October, A. D. 1913, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

183 I.A. 58

Ralph M. D. C.

ERROR TO  
APPEAL FROM

No. 5

vs.

Circuit

COURT

March Term, 1913.

Johnson

COUNTY

Maurit

Wae

TRIAL JUDGE

Hon.

A. E. Jones

✓ 1831.540

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon on the Fourth Tuesday in the month of March in the year of our LORD, one thousand nine hundred and thirteen, the same being the 25th day of March, in the year of our LORD, one thousand nine hundred and thirteen.

Present:

- Hon. JAMES C. McBRIDE, Presiding Justice.
- Hon. OWEN P. THOMPSON, Justice.
- Hon. HARRY HIGBEE, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff.

And afterwards in Vacation, after said March Term, to-wit: On the 9th day of October, A. D. 1913, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Brown

1831.A. 540

ERROR TO  
APPEAL FROM

No. 14 vs.

County COURT

March Term, 1913.

Alexander COUNTY

Royal Casualty Co

TRIAL JUDGE  
Hon. Wm S. Dewey



Term No. 14.

March Term, A. D. 1913.

Agenda No. 51.

M i l t o n   B r o w n ,     )  
                                  )  
                          Appellee,     )  
                  vs.                    )  
                                  )  
Royal Casualty Company of     )  
St. Louis, Missouri,           )  
                          Appellant.     )

Appeal from  
County Court of Alexander.

183LA. 540

Opinion by Higbee, J.

Appellant issued an insurance policy to William Brown, April 1, 1910, which in case of his death, was payable to his father Milton Brown, appellee herein. At the November term, 1912, of the county court of Alexander county, appellee, as beneficiary in said policy, brought suit upon the same, alleging that the death of the insured had taken place on the 17th day of April, 1912. Summons in the case was served upon appellant on October 25, 1912, returnable on November 4, 1912, which was the first day of the November term of said court. On November 7, 1912, no one having appeared for appellant, a default was taken against it, evidence heard and a judgment entered in favor of appellee for the sum of \$205.00. On November 13, 1912, appellant appeared by its attorney, and filed a motion to set aside the default and judgment theretofore entered in said cause and grant a hearing of the case on the merits. The motion was supported by the affidavit of said attorney, stating that he was employed on November 6, 1912, as the attorney of appellant and that he exercised diligence in looking after said cause for his client; that he inquired and was informed no contested cases would be tried or set for trial, until November 11, 1912; that he believed this to be a contested case and that no action or advantage would be taken by reason of no pleas being filed therein until November 11, 1912, but that on further inquiry regarding said cause, he was informed default had been taken and judgment rendered in favor of ap-



Approved: \_\_\_\_\_  
County Court of Allegheny

MILSON BROWN,  
Appellee,  
vs.  
Honal General Company of  
St. Louis, Missouri.

045 .A133

Appellant issued an insurance policy to William Brown, April 1, 1910, which in turn of his death, was payable to his estate. William Brown, appellant herein. At the November term, 1910, of the county court of Alexander county, appellee, as beneficiary in said policy, brought writ upon the same, alleging that the death of the insured had taken place on the 15th day of April, 1910. Summons in the case was served upon appellant on October 23, 1910, returnable on November 4, 1910, which was the first day of the November term of said court. On November 7, 1910, an order was entered for appellant to appear and defend against the writ, which appellant failed to do. On November 13, 1910, appellant appeared for the sum of \$205.00. On November 13, 1910, appellant appeared by the attorney, and filed a motion to set aside the verdict and judgment, alternative reasons for which were set forth in a brief of the case on the merits. The motion was supported by the affidavit of said attorney, stating that he was employed on November 4, 1910, as the attorney of appellant and that he was in attendance in looking after said cause for his client; that he informed and was informed no contested cases would be tried or set for trial, until November 11, 1910; that he believed this to be a contested case and that no action or advantage would be taken in regard to no plea being filed therein until November 11, 1910, but that on further inquiry regarding said cause, he was informed that appellant had been taken and judgment rendered in favor of appellant.

pellee on November 7, 1912. An application to set aside a default is addressed to the sound legal discretion of the court, should show that due diligence was exercised by the party in default and is also defective unless it shows that such party has a meritorious defense. *Hitchcock v. Herzer* 90 Ill. 543. *Garratt v. Queen City Cycle Co.* 179 Ill. 68. *Culver v. Brinkerhoff*, #.180 Ill. 548.

The court properly overruled the motion filed by appellant as it failed to show what steps had been taken by it in regard to its case and also wholly omitted to state it had a meritorious defense to the action and make showing of the same. On the day the motion was overruled appellant appears to have entered a motion for leave to file an amended affidavit in support of the motion theretofore made by him to set aside such default and judgment, and supply affidavits of merits, and subsequently presented an affidavit sworn to by an agent of appellant on November 26, 1912, in that behalf, but the court denied the motion. We are of opinion the court did not abuse its discretion in refusing to permit appellant to file its amended affidavit and supply affidavit of merits. We have however examined the amended affidavit sought to be filed by appellant and which is included in the bill of exceptions and find that it does not set up a state of facts showing appellant had exercised due diligence in attending to his case or in causing it to be looked after. The judgment of the court below will be affirmed.

Affirmed.

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(To be published in abstract only.) •

police on November 7, 1912. An application to set aside a default is addressed to the sound legal discretion of the court, should show that due diligence was exercised by the party in default and is also defective unless it shows that such party has a meritorious defense. *Hitchcock v. Hunter* 93 Ill. 545. *Gart v. Queen City Cycle Co.* 120 Ill. 548. *Oliver v. Brown* 180 Ill. 548.

The court properly overruled the motion filed by appellant as it failed to show what steps had been taken by it in regard to its case and also wholly omitted to state it had a meritorious defense to the action and made showing of the same. On the day the motion was overruled appellant appears to have entered a motion for leave to file an amended affidavit in support of the motion theretofore made by him to set aside such default and judgment, and supply affidavits of merits, and subsequently presented an affidavit sworn to by an agent of appellant on November 26, 1912, in that behalf, but the court denied the motion. We are of opinion the court did not abuse its discretion in refusing to permit appellant to file its amended affidavit and supply affidavit of merits. We have however examined the amended affidavit sought to be filed by appellant and which is included in the bill of exceptions and find that it does not set up a state of facts showing appellant had exercised due diligence in attending to his case or in causing it to be looked after. The judgment of the court below will be affirmed.

(To be published in correct copy.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court  
'at Mt. Vernon, this 9th day of October,  
A. D. 1913.

A. C. Millsbaugh  
Clerk of the Appellate Court.

# OPINION

*Free S.*

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183A 541

354

# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon on the Fourth Tuesday in the month of March in the year of our LORD, one thousand nine hundred and thirteen, the same being the 25th day of March, in the year of our LORD, one thousand nine hundred and thirteen.

Present:

- Hon. JAMES C. McBRIDE, Presiding Justice.
- Hon. OWEN P. THOMPSON, Justice.
- Hon. HARRY HIGBEE, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff.

And afterwards in Vacation, after said March Term, to-wit: On the 9th day of October, A. D. 1913, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Kalinowski  
admt

No. 17  
March Term, 1913.

Wm Don Co. Clerk

183I.A. 541

~~ERROR TO~~  
APPEAL FROM

Circuit COURT

Wmson COUNTY

TRIAL JUDGE  
Hon. A. E. Somers



March Term, A. D. 1913.

Frances Kalinski, Administratrix, )  
 Appellee, )  
 vs. )  
 Williamson County Coal Company, )  
 Appellant. )

Appeal from Williamson.

183 I.A. 541

Opinion by Higbee, J.

This suit was brought by appellee as administratrix of the estate of her husband, Peter Kalinski, to recover damages occasioned by his death, alleged to have been caused by the negligence of appellant, while he was working in its coal mine.

The declaration consisted of five counts in which it was charged that appellant ordered deceased to work in a dangerous place and did not inform him of such danger, which was known to appellant, but not known to deceased. In one of the counts it is alleged that the failure to warn deceased of the dangerous condition, was wilful and in another that appellant wilfully ordered deceased to assist in doing dangerous work. In still another count it was alleged that deceased was inexperienced in this character of work and that appellant knew or should have known of that fact. There was a verdict in favor of appellee for \$2,000.00 and judgment for a like amount.

Concerning the material facts bearing upon the case, which were substantially as follows, there was practically no conflict in the evidence: <sup>A Lithuanian</sup> Peter Kalinski, 31 years of age with a wife and three small children, was on December 19, 1910, employed in a mine of the Williamson County Coal Company and was earning \$2.56 a day. He had been in this country about thirteen months and had little knowledge of the English language. He had worked in appellant's mine about six months as a cager at the bottom of the shaft, assisting in putting loaded cars on the cage to be hoisted and taking empty ones off when returned; he then applied

March Term, A. D. 1913.

Appeal from Williamson.

Frances Kalinski, Administratrix,  
Appellee,  
vs.  
Williamson County Coal Company,  
Appellant.

1831.A. 541

Division of Labor, 1.

This suit was brought by appellee as administratrix of the estate of her husband, Peter Kalinski, to recover damages occasioned by his death, alleged to have been caused by the negligence of appellant, while he was working in the coal mine.

The declaration consisted of five counts in which it was charged that appellant ordered deceased to work in a dangerous place and did not inform him of such danger, which was known to appellant, but not known to deceased. In one of the counts it is alleged that the failure to warn deceased of the dangerous condition, was willful and in another that appellant willfully ordered deceased to assist in doing dangerous work. In still another count it was alleged that deceased was inexperienced in this character of work and that appellant knew or should have known of that fact. There was a verdict in favor of appellee for \$2,000.00 and judgment for a like amount.

Concerning the material facts bearing upon the case, which were substantially as follows, there was practically no dispute in the evidence: Peter Kalinski, 31 years of age with wife and three small children, was on December 12, 1910, employed in a mine of the Williamson County Coal Company and was earning \$1.25 a day. He had been in this country about thirteen months and had little knowledge of the English language. He had worked in appellant's mine about six months as a cager at the bottom of the shaft, assisting in putting loaded cars on the cage to be hoisted and taking empty ones off when returned; he then applied

to the mine manager for work as a timberman but the mine manager refused him. A few days later, however, he again applied for this position and the mine manager, after having made some inquiries in regard to his probable ability to do the work, changed his employment to that of timberman and until his death, he worked in that capacity, assisting a timberman named Mike Waski, also a Lithuanian. The mine manager testified that Kalinski was employed at this work some three or four weeks before he was killed, while Kalinski's brother, a witness for appellee, stated the time to have been only five or six days.

On the morning of the day in question, the mine <sup>examiner</sup> ~~manager~~ in performing his duties, discovered a fall of slate in an entry known as the second west off the eleventh north of the east side. A large amount of slate had fallen and jagged, loose pieces of slate were projecting around the place in the roof from whence it had come. The examiner placed cross marks with chalk on these pieces, and also put like marks in the roadway to indicate danger. He afterwards reported the dangerous condition at that place to the mine manager, the latter went to the place where Waski and deceased were working, cleaning up in the main east entry, and told them that as soon as they had finished there they should go, or hurry up and go, to the second west of the eleventh north and clean up that <sup>fall</sup> and timber it up. There is no doubt from the proofs that the mine manager used the words "hurry up" in directing deceased and Waski to work that morning but there was some difference of opinion among the witnesses as to whether they were used at the time the two were sent to work to clean up the fall in the main east entry or whether it was at the time they were sent to clean the fall at the place where deceased received his injuries. At the place of the fall where Kalinski and Waski were sent, the entry had been widened into a room and two Frenchmen were mining coal there. They came to the mine manager while he was at the place



to the mine manager for work as a timberman but the mine manager refused him. A few days later, however, he again applied for this position and the mine manager, after having made some inquiries in regard to his probable ability to do the work, changed his employment to that of timberman and until his death he worked in that capacity, assisting a Lithuanian named Kaski, also a Lithuanian. The mine manager testified that Kaski was employed at this work some three or four weeks before he was killed, while Kaski's assistant, a Lithuanian named Kaski, stated the time to have been only five or six days.

On the morning of the day in question, the mine manager, in performing his duties, discovered a fall of slate in an area known as the second west off the eleventh north of the east side. A large amount of slate had fallen and jagged, loose pieces of slate were projecting around the place in the road from whence it had come. The examiner placed cross marks with chalk on these pieces, and also put like marks in the roadway to indicate danger. He afterwards reported the dangerous condition at that place to the mine manager, the latter went to the place where Kaski and deceased were working, clearing up in the main east entry and told them that as soon as they had finished there they should go, or hurry up and go to the second west of the eleventh north and clean up that and timber it up. There is no doubt from the proofs that the mine manager used the words "hurry up" in directing deceased and Kaski to work that morning but there was some difference of opinion among the witnesses as to whether they were used at the time the two were sent to work to clean up the fall in the main east entry or whether it was at the time they were sent to clean the fall at the place where deceased received his injuries. At the place of the fall where Kaski and deceased were sent, the entry had been widened into a room and two Frenchmen were raising coal there. They came to the mine manager while he was at the place

where deceased and others were engaged in removing the fall in the main east entry and told them of the fall in their entry. He told them to return to their place and he would send timbermen over to help them as soon as the work was complete in the main east entry. By the time deceased and Waski had reached the place the Frenchmen had cleaned the roof off about the fall removing the jagged pieces, which had been left hanging and among them those on which the danger marks had been placed and had commenced removing the fall of slate. Preparatory to going to work, Waski took a pick and sounded the roof, deceased standing near his side. The two Frenchmen also sounded the roof at that time and they testified they found it solid and that Waski stated it was solid. All four then went to work cleaning up the fall and while so doing a piece of rock or slate about six inches thick, six or seven feet wide and twelve feet long suddenly dropped from the roof on Kalinski and injured him so severely that he afterwards died. Waski, when testifying in the case, was asked whether the roof sounded solid and replied, "not very loose and not very solid, don't hardly know what." He also said, "I thought I could go to work but did not know how long it would stand." The mine manager, Marlow, testified in reference to sending Kalinski and Waski to work at the place where the former was injured, "I knew it was dangerous when I sent them up there to work, I do not think I told Pete it was dangerous or gave him any precautions. I just told him the slate was down and to clean it up and timber it up. This was something like an hour before he got killed;" that the place he sent him to was probably 400 yards from the place where he was talking with him.

The principal question on the facts is, whether the mine manager was guilty of negligence in sending deceased into a place of danger without warning him of the dangerous conditions existing there, it appearing that the manager knew of the danger

where deceased and others were engaged in removing the tail in the main east entry and told them of the fall in their entry. He told them to return to their place and he would send timber to help them. By the time deceased and Waski had reached the place the Trenchmen had cleared the roof off about the fall removing the jagged pieces, which had been left hanging and among them those on which the danger marks had been placed and had commenced removing the tail of slate. In preparation for going to work, Waski took a pick and rounded the roof, deceased standing near his side. The two Trenchmen also rounded the roof at that time and they testified they found it solid and that Waski stated it was solid. All four then went to work cleaning up the fall and while so doing a piece of rock or slate about six inches thick, six or seven feet wide and twelve feet long suddenly dropped from the roof on Kallinski and injured him as he was standing on the roof. Waski, when testifying in the case, was asked whether the roof sounded solid and replied, "not very loose and not very solid, don't hardly know what." He also said, "I thought I could go to work but did not know how long it would stand." The mine manager, Barlow, testified in reference to the accident that he was standing on the roof at the time the rock fell and that he was looking down at the accident when it happened. He said, "I know it was dangerous when I was there to work, I do not think I told him it was dangerous or that it was dangerous. I just told him the slate was down and to stand it up was that it up. This was something five or six feet before he got killed." That the place he sent him to was a place where the slate was down and he was looking down at the accident when it happened. The mine manager was guilty of negligence in sending deceased into a place of danger without warning him of the dangerous conditions existing there, it appearing that the manager knew of the danger

and failed to give the warning. Appellant correctly contends that a master is not bound to warn a servant of dangers which are necessarily attendant upon the work he is about to do and of which he is warned by the very nature of his employment, nor is he obliged to instruct a servant as to dangers which are obvious or known or ought to be known to him. Ashcraft v. Roberts Co. 155 Ill. App. 88; Kendeior v. Ills. Steel Co. 146 Ill. App. 439. In this case the jury were warranted in believing that Kalinski did not know of the danger he was incurring in working at the place where he was injured. He was not an experienced miner and had only worked at timbering a very short time, the testimony of the witnesses on the subject ranging from five days to a month. He saw the roof sounded by the Frenchmen who had worked in the room and by his experienced associate Waski, and must have understood from the latter that it was safe to work under. He was working under express directions from the mine manager to clean up the slate that was down and timber up. This was a specific order to do a particular thing. Kalinski's knowledge of the English language was very little and there was nothing in the directions to him to indicate there was any danger to be incurred by him in obeying the order or that he was being called upon to make a dangerous place safe and when he arrived at the place, the jagged pieces hanging from the roof had been removed and he found no signals to warn him of danger. Under all the circumstances of the case, the jury might well and with reason, have found that appellant was guilty of negligence in directing Kalinski to do the work in question, without warning him of danger. Whether the order was, from its nature, wilful or whether there was a wilful failure to warn deceased of his danger, were also questions to be properly submitted to the jury for consideration and this was done in two instructions. Appellant also contends that even if it were guilty of the negligence complained of, such negligence was not the proximate cause of the



and called to give the warning. Kalinski's evidence was that a master is not bound to warn a servant of dangers which are necessarily attendant upon the work he is about to do and of which he is warned by the very nature of his employment, nor is he obliged to instruct a servant as to dangers which are obvious or known or ought to be known to him. Kalinski v. Roberts, 100 Ill. App. 2d 402, 111 Ill. App. 2d 402. In this case the jury were instructed to believe that Kalinski did not know of the danger he was undertaking to remove the pile of lumber he was lifting. He was not an experienced worker and had only a few days' training from five days to a month. He saw the roof rumbled by the firemen who had worked in the room and by his experienced associate, Waski, and must have understood from the latter that it was safe to work under. He was working under express directions from the mine manager to clean up the waste that was down and timber up. This was a well-known rule in the particular mine. Kalinski's knowledge of the English language was very little and there was nothing in the directions to him to indicate there was any danger to be incurred by him in obeying the order or that he was being called upon to make a dangerous place safe and when he arrived at the place, the jagged pieces hanging from the roof had been removed and he found no signals to warn him of danger. Under all the circumstances of the case, the jury might well and with reason have found that Kalinski was guilty of negligence in directing Kalinski to do the work in question, without warning him of danger, whether the order was, from its nature, willful or whether there was a willful failure to warn deceased of his danger, were also questions to be decided by the jury. Kalinski v. Roberts, 100 Ill. App. 2d 402, 111 Ill. App. 2d 402. It was also instructed that if it was found that Kalinski was guilty of negligence, such negligence was not the proximate cause of the



injury to Kalinski and his subsequent death. This also was a question of fact for the jury and the proofs appear to us to have been sufficient to sustain the theory that had Kalinski been warned of the danger he would have taken steps to avoid it.

Appellant criticises instructions one and two given for appellee, because they stated that the question whether or not Kalinski was in the exercise of ordinary care for his personal safety before and at the time of the occurrence of the injury in question and the question whether or not appellant was guilty of negligence and wilfulness, as charged in the declaration, were questions of fact to be determined by the jury from the evidence. The theory upon which this objection of appellant to the instructions is urged, appears to be that these instructions tended to lead the jury to believe that they could act in determining such facts in the case, independently of the law and cases are cited in which similar instructions have been disapproved by our courts. It is true that these instructions could have been rendered more strictly accurate had they contained further statements informing the jury that in deciding such questions of fact they must consider and be guided by the law applicable thereto, as laid down by the instructions of the court. Cases might arise where such instructions would be misleading to the jury but we do not think that this is such a case. The court gave twenty-three instructions for appellant fully covering appellant's theories of the law as applicable to the facts in the case and in its instruction No. 17, the jury were directly told, that they must first determine the question of appellant's liability under the rules of law given to them by the court in the instructions.

Further complaint is made of the second instruction and is also applied to the fifth instruction given for appellee, because they referred the question of wilfulness to the jury when, as it is claimed, there was no evidence offered in the case tending

injury to Kalinski and his subsequent death. This also was a question of fact for the jury and the proofs appear to us to have been sufficient to sustain the theory that had Kalinski been warned of the danger he would have taken steps to avoid it. Appellant criticizes instructions one and two given for appellee, because they stated that the question whether or not Kalinski was in the exercise of ordinary care for his personal safety before and at the time of the occurrence of the injury in question and the question whether or not appellant was guilty of negligence and willfulness, as charged in the declaration, were questions of fact to be determined by the jury from the evidence. The theory upon which this objection of appellee to the instructions is urged, appears to be that these instructions tended to lead the jury to believe that they could not in determining such facts in the case, independently of the law and cases are cited in which similar instructions have been disapproved by our courts. It is true that these instructions have been used repeatedly in this State and have been approved by the courts. Further, the instructions in the case at hand are not questions of fact but must be considered and be guided by the law applicable thereto. As this case is a declaratory judgment case, the court has the right to determine the law applicable to the facts in the case and in its instruction No. IV, the jury were directed to find that they must determine the question of whether or not appellant was negligent and whether or not he was guilty of negligence and willfulness under the law as given in the instructions. Further complaint is made of the second instruction and is also made of the fifth instruction given for appellee, that they related the question of willfulness to the jury when, as it is claimed, there was no evidence offered in the case tending

to prove that appellant was guilty of wilfulness. From what we have before said, it will appear that we are of the opinion there was evidence which made it proper to submit the question of wilfulness to the jury as one of the questions to be decided by them under the declaration and the proofs, and there was therefore no error in giving these instructions.

The fifth instruction is further criticised by appellant, because it directed the attention of the jury to the question whether the wilfulness charged against appellant, if any such was shown, was the proximate cause of the injury and death of Kalinski without defining the term proximate cause. While no definition, technical or otherwise, was given of this exact term, yet the jury were so accurately informed as to what they must find from the proofs before appellee would be entitled to a verdict, that they could not have been misled or confused by a failure to define this term.

Instruction No. 4 given for appellee, after telling the jury that they were the sole judges of the weight and credit which should be given to the testimony of the various witnesses, proceeded, "no juror should refuse to give weight and credit to the testimony of any witness or witnesses on account of their race or nationality, but should fairly and impartially weigh and consider all the evidence and circumstances in proof in this case and give to the evidence of each and every witness, who has testified in this case, such weight and credit as the jury think the same is justly entitled to receive." The principal objection urged to this instruction is that it told the jury to give the testimony of the witnesses such weight and credit as they ~~ought~~ thought the same justly entitled to receive, thus allowing unlimited latitude in judging of the credibility of witnesses and not requiring them to base their judgment on the evidence in the case. Appellant relies on the case of C.H.S.St.Ry.

to prove that defendant was guilty of -illegitimacy. From what  
we have before said, it will appear that we are of the opinion  
there was evidence which made it proper to submit the ques-  
tion of illegitimacy to the jury as one of the questions to be  
decided by them under the instructions and the prayer, and there  
was therefore no error in giving those instructions.  
The fifth instruction is further criticized as defective,  
because it directed the attention of the jury to the question  
whether the defendant charged against plaintiff, it was shown  
was shown, was the proximate cause of the injury and death of  
Kalinaki without defining the term proximate cause. While no  
definition, technical or otherwise, was given of this exact term,  
yet the jury were so accurately informed as to what they must  
find from the proofs before applied would be entitled to a ver-  
dict, that they could not have been misled or confused by a fail-  
ure to define this term.  
Instruction 10, which is given for dismissal, after telling the  
jury that they were to give weight to the weight of evidence  
when should be given to the testimony of the various witnesses  
proceeded, "no juror should refuse to give weight and credit  
to the testimony of any witness or witnesses on account of their  
race or nationality, but should weigh and consider all the  
evidence and circumstances in proof in this  
case and give to the evidence as much weight as every witness, who  
was entitled to this case, when given and credit to the jury  
think the case is justly entitled to receive." The objection  
objection urged in this instruction is that it told the jury to  
give the testimony of the witnesses more weight and credit than  
they ought though the same be justly entitled to receive, thus af-  
fording unlimited latitude in judging of the credibility of wit-  
nesses and not requiring them to base their judgment on the evi-  
dence in the case. Appellant relies on the case of U.S. v. Mc  
Kenna, 100 U.S. 220, 225, 10 U.S. 220, 10 U.S. 220.



Co. v. Hobson 93 Ill. App.98 as authority to sustain the position that the instruction above referred to is erroneous. The instruction referred to in that case, however, is radically different from the one we are considering here. The court says of it, "The instruction makes no reference whatever to the evidence, leaves the jury at liberty to determine the facts from any source other than the evidence." The instruction before us distinctly tells the jury that they must fairly and impartially weigh and consider all the evidence and circumstances in proof, and the fair inference from it is that this should be done in determining the weight which they should give to the testimony of the respective witnesses.

Each of the eight instructions given for appellee is criticised by appellant and claimed to be erroneous, except the third, but while we have carefully considered all the objections raised and while we find that several of the instructions are not carefully worded and might well have been more guarded, yet we do not consider it essential to discuss the objections to said instructions other than those above mentioned, further than to say that no one of them in our opinion contains such prejudicial error as to call for the reversal of the judgment on that account.

In regard to the evidence it appeared, as above stated, that ~~that~~ while the mine manager directed Kalinski and Waski to go to the place where Kalinski was injured to do certain work, which was some 1200 feet from the place where the two were working at the time such directions were given, that he did not accompany them when they went to do such work. On cross examination the mine manager was asked whether he was well and healthy at that time and able to walk over the mine and whether there was any reason why he could not have gone up there. Over the objections of appellant he was permitted to answer that he was not incapacitated in any way that would have prevented him from going up



Co. v. Jones 12 Ill. App. 2d 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

there to see the conditions. Appellant states that by permitting the above question to be answered over its objection, the impression was given to the jury that it was the duty of the mine manager to go with the workmen in person. We do not think this objection is well founded, but even if it were, the jury were expressly informed in appellant's instructions No. 13 and 21 that it was not the duty of the mine manager in person to accompany men directed by him to do such work.

Appellant offered to prove by the secretary of the Local Union of United Mine Workers, at appellant's mine, that said union kept a record of practical miners and that such record would contain the name of deceased. It is said by counsel for appellant that it was sought in this manner, not to show as a matter of fact that the deceased was a practical miner, but to show that he had submitted proof or evidence to the local organization of which he had become a member, showing that he was a practical miner and that this evidence was proper in view of the claim in the declaration that deceased was an inexperienced man and that appellant knew it. Whether appellant was a practical miner or an inexperienced man, was a proper subject of investigation under the declaration, but whether he had submitted proofs upon those lines to an organization of which he was a member, was wholly immaterial. Proofs of his experience or inexperience to be available in this case, must have been submitted to the court trying the case and the evidence sought to be introduced, was properly excluded. The judgment of the court below will be affirmed.

Judgment Affirmed.

*abundant*  
(To be published in full.)

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mitting the above question to be answered over the objection,  
the impression was given to the jury that it was the duty of  
the mine manager to go with the woman in person. He does not  
think this objection is well founded, but even if it were, the  
jury were expressly informed in appellant's testimony that  
and SI that it was not the duty of the mine manager in person  
to accompany and deliver to him in such way.  
Appellant offered to prove by the secretary of the local union  
of United Mine Workers, of appellant's mine, that such union  
kept a record of practical miners and that such record would  
contain the name of deceased. It is said by counsel for appel-  
lant that it was sought in this manner, not to show as a matter  
of fact that the deceased was a practical miner, but to show  
that he had worked at or at least in the local organi-  
zation of which he had become a member; showing that he was a  
practical miner and that this evidence was proper in view of  
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tical miner or an inexperienced man, was a proper subject of  
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sed proofs upon these lines to an organization of which he was  
a member, was wholly immaterial. Proof of his experience or  
inexperience to be available in this case, must have been sub-  
mitted to the court trying the case and the evidence sought to  
be introduced, was properly excluded. The judgment of the court  
below will be affirmed.

Judgment affirmed.

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 9th day of October, A. D. 1913.

.....  
Clerk of the Appellate Court

# OPINION

*Fee \$* .....

.....



183A557

357

# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon on the Fourth Tuesday in the month of March in the year of our LORD, one thousand nine hundred and thirteen, the same being the 25th day of March, in the year of our LORD, one thousand nine hundred and thirteen.

Present:

Hon. JAMES C. McBRIDE, Presiding Justice.

Hon. OWEN P. THOMPSON, Justice.

Hon. HARRY HIGBEE, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff.

And afterwards in Vacation, after said March Term, to-wit: On the 9th day of October, A. D. 1913, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

1831.A. 557

~~ERROR TO~~  
APPEAL FROM

St L Wholesale  
Clothing mfg co

No. 23 vs.

March Term, 1913.

City COURT

Atton COUNTY

Lone

TRIAL JUDGE

Hon.

J. E. Dunningan



Term No. 23.

Agenda No. 27.

March Term, A. D. 1913.

St. Louis Wholesale Clothing  
and Manufacturing Company,  
Appellee,  
vs.  
Joseph Lonie,  
Appellant.)

Appeal from  
City Court of Alton.

183 I.A. 557

Opinion by Higbee, J.

It appears from the stipulation entered into by the parties to this suit that the St. Louis Wholesale Clothing and Manufacturing Company (A. Rosenberg), obtained a judgment against Appellant Joseph Lonie, for \$29.65 before Daniel Gorman, a justice of the peace, and that said judgment remains unsatisfied. The date of this judgment is not given in the stipulation, but said Gorman appears to have been a justice of the peace of Madison County, Illinois, at the time and he testified said judgment was rendered by him on January 29, 1910. The stipulation further provided that afterwards garnishment proceedings were instituted against the Illinois Glass Company and that \$41.00 was found in the hands of the garnishee, owing by it to the defendant Joseph Lonie, and judgment was entered accordingly. On appeal to the City court of Alton, judgment was given in favor of Lonie for the use of the St. Louis Wholesale Clothing and Manufacturing Company against the Illinois Glass Company for \$29.60 and costs, from which judgment Lonie has appealed to this court.

The proofs show that at the time of the original judgment and for a number of years prior thereto, Abraham Rosenberg, was doing business in Alton, Illinois, under the name and style of the St. Louis Wholesale Clothing and Manufacturing Company. Rosenberg lived in St. Louis, Missouri, and came to Alton four or five times a week to look after his business, which, in his ab-

March Term, A. D. 1913.

Appeal from  
City Court of Alton.

St. Louis Wholesale Clothing  
and Manufacturing Company,  
Appellee,  
vs.  
Joseph L. Jones,  
Appellant.

1881 A. 227

Opinion of the Court.

It appears from the stipulation entered into by the parties to this suit that the St. Louis Wholesale Clothing and Manufacturing Company (A. Rosenberry), obtained a judgment against Joseph L. Jones, for \$25.00 before United States, a Justice of the Peace, and that said judgment remains unsatisfied. The case of this judgment is set down in the stipulation, but will not be repeated here to have been a Justice of the Peace of Madison County, Illinois, at the time and he testified said judgment was rendered by him on January 30, 1910. The stipulation further provided that said Justice of the Peace was in Madison County, Illinois, at the time and he testified said judgment was rendered by him on January 30, 1910. The stipulation further provided that the Illinois Glass Company and that \$25.00 was paid in the hands of the Justice of the Peace, and that the same was paid to the Justice of the Peace, and judgment was entered accordingly. It is requested to the City Court of Alton, Judgment was given in favor of Jones for the use of the St. Louis Wholesale Clothing and Manufacturing Company against the Illinois Glass Company for \$25.00 and costs, from which judgment Jones has appealed to this Court.

The Court then took of the case of the original judgment and for a number of days prior thereto, Alton, Missouri, was being business in Alton, Illinois, about the same and while of the St. Louis Wholesale Clothing and Manufacturing Company, for which Jones is St. Louis, Missouri, and was in Alton, Missouri, when Jones was in Alton after the judgment, when, in the

sence, was conducted by his clerks, among whom was his son Nathan. On February 7, 1910, appellant Joseph Lonie filed a petition in bankruptcy and on February 14 following, was adjudged a bankrupt. With his petition he filed a schedule containing a list of his creditors in which no mention was made of any debt due Abraham Rosenberg or the St. Louis Wholesale Clothing and Manufacturing Company, but it did name among the creditors, "Nathan Rosenberg, judgment \$35." The Proceedings in the bankruptcy of appellant, which were certified to by the clerk of the United States court where they were had and introduced in evidence in this case, showed that a notice that Lonie had been adjudicated a bankrupt and fixing a time for a meeting of creditors to prove their claims and appointing a trustee, had been sent by the referee to all creditors of record, March 3, 1910, and that a like notice was duly published in an Alton paper about the same time.

This appeal presents the questions whether the judgment of appellee against appellant, as above set forth, was named in the latter's debtors schedule and if so did appellee, the judgment creditor have knowledge or notice of it? As a matter of fact the name of appellee did not appear in the debtors' schedule nor was the amount of the judgment in question shown therein. But it is insisted by appellant that the words "Nathan Rosenberg judgment \$35." were sufficient notice to appellee of the fact of the bankruptcy and that his debt was intended to be included. He further insists that Nathan Rosenberg was manager for his father in Alton and that legal notice was sent to him and was sufficient to bind the father. Abraham Rosenberg testified that he had no notice whatever of the proceedings in bankruptcy against Joseph Lonie, or of his discharge; that he first learned about the bankruptcy proceedings when he brought this suit before the Justice of the peace, Gorman; that at the time in controversy his



gence, was conducted by his clerk, among whom was his son Nathan. On February 7, 1910, appellant Joseph Louis filed a petition in bankruptcy and on February 14 following, was adjudged a bankrupt. With his petition he filed a schedule containing a list of his creditors in which no mention was made of any debt due Abraham Rosenberg or the St. Louis Wholesale Clothing and Manufacturing Company, but it did name among the creditors, "Nathan Rosenberg, judgment \$55.00." The proceedings in the bankruptcy of appellant, which were certified to by the clerk of the United States court where they were had and introduced in evidence in this case, showed that a notice that Louis had been adjudicated a bankrupt and fixing a time for a meeting of creditors to prove their claims and appointing a trustee, had been sent by the referee to all creditors of record, March 3, 1910, and that a like notice was duly published in an Alton paper about the same time.

This appeal presents the question whether the judgment of appellee against appellant, as above set forth, was named in the latter's debtors schedule and if so did appellee, the judgment creditor have knowledge or notice of it? As a matter of fact the name of appellee did not appear in the debtors' schedule nor was the amount of the judgment shown therein. But it is insisted by appellant that the words "Nathan Rosenberg judgment \$55.00" were sufficient notice to appellee of the fact of the bankruptcy and that his debt was intended to be included. He further insists that Nathan Rosenberg was manager for his father in Alton and that legal notice was sent to him and was sufficient to bind the father. Abraham Rosenberg testified that he had no notice whatever of the proceedings in bankruptcy against Joseph Louis, or of his discharge; that he first learned about the bankruptcy proceedings when he brought this suit before the Justice of the Peace, District Court of the State of Missouri, No. 100.

son Nathan was 20 years of age and was not manager of his business in Alton. Nathan Rosenberg, the son, testified he was not manager of the business at Alton and that to the best of his knowledge he never received a copy of the notice of the bankruptcy proceedings against appellant.

Appellant testified that about two months after he filed his petition in bankruptcy, he met Abraham Rosenberg and had a conversation with him concerning the matter, but this was denied by said Rosenberg. The bankruptcy act of 1898 provides, Section 7a (8) and section 17-- Debts not effected by discharge, a (3). that the bankrupt must file a list of creditors, giving names and residences correctly, and his schedule must show accurately the amount due each creditor and the consideration therefor and that any debt not so shown on the schedule, shall not be barred by discharge unless the creditor had notice or actual knowledge of the bankruptcy.

The proofs in this case appear to us to have warranted the trial judge, who heard the case, without a jury, in finding that appellant had failed to schedule the debt in question, as required by the statute, and also that appellee had <sup>no</sup> notice or actual knowledge of appellant's bankruptcy. Under such circumstances, appellant was not protected in the payment of this debt by his discharge in bankruptcy, and the judgment of the court below, in favor of appellee, must be affirmed.

Judgment Affirmed.

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(To be published in abstract only.)

son Nathan was 20 years of age and was not manager of his business in Alton. Nathan Rosenberg, the son, testified he was not manager of the business at Alton and that to the best of his knowledge he never received a copy of the notice of the bankruptcy. Rosenberg testified against appellant.

Appellant testified that about two months after the filing of the petition in bankruptcy, he met Abraham Rosenberg and had a conversation with him concerning the matter, but this was denied by said Rosenberg. The bankruptcy act of 1898 provides, Section 74 (8) and section 171. Debtors not affected by discharge, a (3). That the bankrupt must file a list of creditors, giving names and residences correctly, and his schedule must show accurately the amount due each creditor and the consideration therefor and that any debt not so shown in the schedule shall not be barred by discharge unless the creditor had notice or actual knowledge of the bankruptcy.

The statute in this case appears to me to have required the trial judge, who heard the case, without a jury, in finding that appellant had failed to schedule the debt in question, as required by the statute, and also that appellee had notice or actual knowledge of appellant's bankruptcy. Under such circumstances, appellant was not protected in the payment of this debt by his discharge in bankruptcy, and the judgment of the court below, in favor of appellee, must be affirmed. Judgment Affirmed.

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 9<sup>th</sup> day of October, A. D. 1913.

.....  
Clerk of the Appellate Court.

# OPINION

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1831A 558  
Nov 5 1913  
308

# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon on the Fourth Tuesday in the month of March in the year of our LORD, one thousand nine hundred and thirteen, the same being the 25th day of March, in the year of our LORD, one thousand nine hundred and thirteen.

Present:

Hon. JAMES C. McBRIDE, Presiding Justice.

Hon. OWEN P. THOMPSON, Justice.

Hon. HARRY HIGBEE, Justice.

A. C. MILLSAUGH, Clerk.

W. S. PAYNE, Sheriff.

And afterwards in Vacation, after said March Term, to-wit: On the 9th day of October, A. D. 1913, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

1831A. 558

~~ERROR TO~~  
APPEAL FROM

No. 25

vs.

March Term, 1913.

Circuit COURT

Madison COUNTY

TRIAL JUDGE

Hon. Louis Bernhardt



March Term, A. D. 1913.

Adolph Hitz, )  
 vs. Appellant, )  
 Illinois Central Rail- )  
 road Company, )  
 Appellee. )

Appeal from Madison.

183 I.A. 558

Opinion by Higbee, J.

This suit was brought by appellant against the Illinois Central Railroad Company, to recover damages claimed to have been caused by a fire, set by one of the company's engines which burned over appellant's land, destroying a timothy field and about 25 acres of orchard said to contain about 1000 grown apple trees, besides a large number of plum, peach and pear trees. There were four counts in the declaration. The first charged a failure on the part of appellee to keep its right of way free from dry weeds, dead grass and other dangerous, combustible material, and that the fire originated thereon and spread to appellant's land; the second a failure on the part of appellant to keep its right of way clean as provided by the statute; that fire was communicated to combustible material thereon, by a passing engine, which passed from thence to appellant's land; the third, negligence on the part of appellant in operating one of its engines, whereby sparks and cinders were permitted to escape and fall upon appellant's land, thereby causing the fire; the fourth, failure on the part of appellee to equip its engines with the best and most approved appliances to prevent the escape of fire and that by reason thereof brands of fire were permitted to fall upon appellant's land. There was a plea of the general issue and a verdict of not guilty. A jury also found in answer to special interrogatives submitted by appellee, that the fire originated off of the right of way of appellee; that it was started by an engine of appellee; that the engine was equipped #

WATSON, J., 1912.

Appeal from Madison.

1831.A. 558

Adolph Hitz,  
Appellant,  
vs.  
Illinois Central Railroad Company,  
Appellee.

Opinion by Hitz, J.

This suit was brought by appellant against the Illinois Central Railroad Company, to recover damages claimed to have been caused by a fire, set by one of the company's engines which burned over appellant's land, destroying a timothy field and a part of 25 acres of orchard said to contain about 1000 grown apple trees, besides a large number of plum, peach and pear trees. There were four trunks in the destruction. The first trunk failed on the part of appellee to keep the right of way free from dry weeds, dead grass and other dangerous, combustible material, and that the fire originated thereon and spread to appellant's land; the second a failure on the part of appellant to keep its right of way clean as provided by the statute; that the fire was communicated to combustible material thereon, by a negligent engine, which passed from thence to appellant's land; the third, negligence on the part of appellant in operating one of its engines, whereby sparks and kindling were permitted to escape and fall upon appellant's land, thereby causing the fire; the fourth, failure on the part of appellant to equip its engines with fire bell and most approved appliances to prevent the escape of fire and that by reason thereof brands of fire were permitted to fall upon appellant's land. There was a plea of the general issue and a verdict of not guilty. A jury also found in answer to special interrogatives submitted by appellee, that the fire originated off of the right of way of appellee; that it was started by an engine of appellee; that the engine was equipped with

with one of the best and most approved spark arresters in common use by railroads; that the spark arrester was in good repair at the time of the fire; that the engine was operated at the time of the fire in a careful manner by skilful employes. Judgment was entered against appellant for costs, from which he has appealed to this court, claiming that the verdict was against the weight of the evidence and that the trial court erred in ruling upon the admission and exclusion of evidence and in instructing the jury.

The greater portion of the evidence introduced on the trial, related to the nature and value of the property destroyed and is unnecessary for us to consider in detail, as it had bearing only upon the question of the amount of damages which cannot effect the rights of the parties on this appeal. As to the facts as disclosed by the proofs, appellant, a banker living at Albana, Madison County, Illinois, owned an orchard of about twenty-five acres at the edge of the town. The land was in a square and appellee's right of way running in a northeasterly and southwesterly direction, came close to the northwest corner of the tract. Appellant also owned a triangular piece of ground in timothy, some five or six acres in extent, between appellee's right of way and the orchard. A hedge fence ran south from the right of way, dividing the triangular piece from the orchard. The railroad embankment on the right of way next to the timothy field, was from three to nine feet in height and close to the field and on the embankment was appellee's passing track, leaving but a narrow strip of some five or six feet between the embankment and the fence along the right of way next to appellant's premises. On July 10, 1911, shortly after the 10:30 A. M. train had passed, appellant was informed there was smoke near his orchard and thereupon he and his janitor went down the track and discovered the fire and before the same could be extinguished, most of the tim-



with one of the best and most approved spark arresters in common use by railroads; that the spark arrester was in good repair at the time of the fire; that the engine was operated at the time of the fire in a careful manner by skillful employees. Judgment was entered against appellant for costs, from which he has appealed to this court, claiming that the verdict was against the weight of the evidence and that the trial court erred in ruling upon the admission and exclusion of evidence and in instructing the jury.

The greater portion of the evidence introduced on the trial related to the nature and value of the property destroyed and is unnecessary for us to consider in detail, as it had bearing only upon the question of the amount of damages which cannot effect the rights of the parties on this appeal. As to the facts as disclosed by the proofs, appellant, a banker living at Alhambra, Madison County, Illinois, owned an orchard of about twenty-five acres at the edge of the town. The land was in a square and appellee's right of way running in a northeasterly and southwesterly direction, came close to the northwest corner of the tract. Appellant also owned a triangular piece of ground in Timothy, some five or six acres in extent, between appellee's right of way and the orchard. A hedge fence ran south from the right of way, dividing the triangular piece from the orchard. The railroad embankment on the right of way next to the Timothy field, was from three to nine feet in height and close to the field and on the embankment was appellee's passing track, leaving but a narrow strip of some five or six feet between the embankment and the fence along the right of way next to appellee's premises. On July 10, 1911, shortly after the 10:30 A. M. train had passed, appellant was informed there was smoke near his orchard and thereupon he and his janitor went down the track and discovered the fire and before the same could be extinguished, most of the tim-

othy field and orchard had been burned over. Appellant claims that 911 apple trees were killed by the fire. Appellant<sup>ant</sup> and his janitor swore positively the fire started on the railroad right of way and that it had burned about 150 feet along the right of way before it got into the field. Three witnesses for appellee<sup>ant</sup>, all of them its employees, one a flagman, one a switchman and the third the agent at Alhambra, testified that when they reached the place, after appellant and his janitor, there was no fire on the right of way and the fire was then on appellant's land. The section foreman testified he visited the place the next morning and found one place burned about half the size of a wagon wheel on the right of way and another place two feet in width and 30 feet in length.

The jury found that the fire was started by a passing engine of appellee. It then became important to determine whether it started on or off of the right of way. There was a special finding upon this subject, showing that the fire originated off of the right of way and this finding was fully supported by the evidence. The proofs that the fire was communicated by appellee's engine, raised a prima facie inference of negligence on the part of appellee, but this prima facie case could be overcome by proof that the locomotive was equipped with one of the best and most approved spark arresters; that such spark arrester was at the time the fire was communicated, in good order and repair and that the locomotive was being carefully managed at the time, by a competent and careful engineer. T.St.L. & W.R.R. Co. v. Valodin 109 Ill. App. 132; C. & E.I. v. Madison 81 id. 393; First National Bank v. L.E. & W.R.R. Co. 174 Ill. 36.

Substantially all the proof on these subjects was introduced by appellee and in accordance therewith, the jury made special findings in favor of appellee upon all these subjects as above indicated. The general verdict in favor of appellee followed naturally from the special findings.

Appellant complains that his rights were prejudiced by the

other field and orchard had been burned over. Appellant claims that all apple trees were killed by the fire. Appellant and his tentor swore positively the fire started on the railroad right of way and that it had burned about 150 feet along the right of

way before it got into the field. Three witnesses for appellant, all of them its employees, one a fireman, one a switchman and the third the agent at Alhambra, testified that when they reached the place, after appellant and his tentor, there was no fire on the right of way and the fire was then on appellant's land. The section foreman testified he visited the place the next morning and found one place burned about half the size of a wagon wheel on the right of way and another about two feet in width and 30 feet in length.

The jury found that the fire was started by a passing engine of appellant. It then became important to determine whether it started on or off of the right of way. There was a special finding upon this subject, showing that the fire originated off of the right of way and this finding was fully supported by the evidence. The precise place the fire was communicated by appellant's engine, which is shown by the evidence of witnesses on the part of appellant, but the jury found that it was communicated by appellant's engine that the locomotive was equipped with one of the best and most approved spark arresters; that such spark arresters was at the time the fire was communicated, in good order and repair and that the locomotive was being carefully managed at the time by a competent and careful engineer.

Co. v. Valodis 109 Ill. App. 132; C. & N. v. Madison 81 Id. 323; First National Bank v. D. & W. 117 Ill.

Substantially all the proof on these subjects was introduced by appellant and in accordance therewith, the jury made special findings in favor of appellant upon all these subjects as above indicated. The general verdict in favor of appellant followed naturally from the special findings.

Appellant complains that his rights were prejudiced by the

admission in evidence of a plat of the premises in question and right of way adjoining, made by an engineer of appellee, because the same marked the boundaries of the burned district, when such boundary was in part a controverted question and also designated one part of it as "opening in hedge where fire burned through." The plat complained of does not appear in the record presented to this Court and in the absence thereof we are unable to determine whether appellant's objections to its admission should have been sustained or not. That we have heretofore said disposes of errors claimed to have been committed in allowing witnesses of appellee to testify as to the value of the orchard when they were not fully familiar with the premises.

It is further contended by appellant that the Circuit court erred in allowing a spark arrester claimed by appellee to have been in the engine at the time of the fire, to be introduced in evidence for the reason that it was not sufficiently identified as being the same that was in the engine at the time stated. On this question the engineer in charge of the engine at the time of the fire, testified he went on with the same from Alhambra to Clinton, where he left the engine and that nothing had been done with the spark arrester. Appellee's supervisor of appliances in engines for fire protection, testified that he saw the engine brought in by said engineer and that nothing was done with the spark arrester before it was examined by several parties; that after the examination it was removed, crated and put away. It was also shown that the spark arrester so crated was the same one brought into court and introduced in evidence and that it was in good condition when said examination was made of it. Under this proof the spark arrester was properly admitted in evidence.







Appellant also states that the court improperly refused to admit testimony of witnesses offered by it in rebuttal, to show that the right of way south of McMichael crossing was burned off by the fire that burned the orchard, to rebut what appears to be the claim of appellee that the fire stopped at said crossing. This matter however had been fully gone into by appellant, in making out his case in chief and there was no error in the court refusing to permit the matter to be gone into again in rebuttal.

Appellant further complains that the first instruction given for appellee, while stating correctly what was required to be proved by appellee to overcome the prima facie case of appellant in case they believed that the fire was set by sparks, from defendant's engine, failed to state that such proof must be made by a preponderance of the evidence. It might be sufficient answer to say that appellant gave an instruction upon the same subject, which made the same statement concerning the evidence, as that complained of in appellee's said instruction, but in any event the omission complained of, could not have misled the jury, when all the instructions are considered together; and upon the whole, the jury appear to have been correctly instructed as to the law bearing upon the issues involved. The judgment of the court below will be affirmed.

Affirmed.

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(TO be published in abstract only.)

Appellant also states that the court improperly refused

to admit testimony of witnesses offered by it in rebuttal, to

show that the right of way north of McMichael crossing was burn-

ed off by the fire that burned the orchard, to rebut what ap-

pears to be the claim of appellee that the fire stopped at said

crossing. This matter however had been fully gone into by appel-

lant, in making out his case in chief and there was no error in

the court refusing to permit the matter to be gone into again

in rebuttal.

Appellant further complains that the first instruction giv-

en for appellee, while stating correctly what was required to be

proved by appellee to overcome the prima facie case of appellant

in case they believed that the fire was set by sparks from de-

fendant's engine, failed to state that such proof must be made

by a preponderance of the evidence. It might be sufficient an-

swer to say that appellant gave an instruction upon the same and

that, which made the same statement concerning the evidence, as

that complained of in appellee's said instruction, but in any ev-

ent the omission complained of, could not have misled the jury,

when all the instructions are considered together; and upon the

whole, the jury appear to have been correctly instructed as to the

law bearing upon the issues involved. The judgment of the court

below will be affirmed.

Witness,

(To be published in abstract only.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 9th day of October, A. D. 1913.

*A. C. Millspaugh*

Clerk of the Appellate Court.

# OPINION

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# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon on the Fourth Tuesday in the month of March in the year of our LORD, one thousand nine hundred and thirteen, the same being the 25th day of March, in the year of our LORD, one thousand nine hundred and thirteen.

Present:

Hon. JAMES C. McBRIDE, Presiding Justice.

Hon. OWEN P. THOMPSON, Justice.

Hon. HARRY HIGBEE, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff.

And afterwards in Vacation, after said March Term, to-wit: On the 9th day of October, A. D. 1913, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

183 I.A. 559

**ERROR TO  
APPEAL FROM**

Watson

No. 30 vs.

March Term, 1913.

Circuit COURT

Madison COUNTY

Tollentine

TRIAL JUDGE  
Hon. Louis Bernheimer





March Term, A. D. 1913.

Warren Watson,	}	
vs. Appellee,		
Alice E. Vollentine,		
Appellant.		Appeal from Madison.

1831.A. 559

Opinion by Higbee, J.

This is an appeal from a judgment in favor of appellee, in the circuit court of Madison county, against appellant for moneys claimed by appellee, to be due him for selling certain premises owned by appellant in said county, under a written instrument, giving him authority to make said sale. A declaration in assumpsit was filed, containing one special count and the common counts. The special count relied upon the contract above referred to, alleging that thereby appellant agreed to pay appellee, all over and above the sum of \$75.00 an acre, for which said real estate should be sold; that appellee sold the land for \$98000 an acre and that there was due him from appellant, the sum of \$690.00, which she refused to pay. Appellant filed the general issue and upon the trial the jury returned a verdict in favor of appellee, for the full amount claimed and judgment was entered in his favor for that sum.

Appellant claims as reasons why the judgment should be reversed, that the contract relied on was unilateral and void for want of mutuality; that the court erred in excluding certain evidence offered by appellant and in the rulings in regard to the instructions and that the proofs did not present a case, which entitled appellee to recover.

The case was based on the following facts: Appellee, a farmer living in Madison county, Illinois, entered into an arrange-

March Term, A. D. 1913.

Appeal from Madison.

Written by Watson,  
 vs.  
 Alice M. Volentine,  
 Appellant.

1831. A. 559

Opinion by Hibbe, J.

This is an appeal from a judgment in favor of appellee, in the circuit court of Madison county, against appellant for money claimed by appellee, to be due him for selling certain premises owned by appellant in said county, under a written instrument, giving him authority to make said sale. A declaration in assumpsit was filed, containing one special count and the common counts. The special count relied upon the contract above referred to, alleging that thereby appellant agreed to pay appellee,

all over and above the sum of \$75.00 an acre, for which said real estate should be sold; that appellee sold the land for \$28000 an acre and that there was due him from appellant, the sum of

\$690.00, which she refused to pay. Appellant filed the general issue and upon the trial the jury returned a verdict in favor of appellee, for the full amount claimed and judgment was entered in his favor for that sum.

Appellant claims as reasons why the judgment should be reversed, that the contract relied on was unilateral and void for want of mutuality; that the court erred in excluding certain evidence offered by appellant and in the rulings in regard to the instructions and that the proofs did not present a case, which

entitled appellee to recover.

The case was based on the following facts: Appellee, a

farmer living in Madison county, Illinois, entered into an arrange-

ment with appellant, his sister, a woman 68 years of age, who had been employed as a cook for several years in and about St. Louis, Missouri, to sell 30 acres of land she owned near the village of New Douglas, in said Madison county, and the employment was evidenced by a written instrument, signed by her in January, 1910, which stated that appellant employed appellee to sell said real estate for the price of \$75.00 an acre to her; that appellee should be entitled as his commission, or compensation, for selling the property, to all over and above the sum of \$75.00 per acre, for which said property might be sold; that appellant should pay the fees and expenses for the deed and abstract and other fees which might be necessary to perfect the title to said premises and release the mortgage liens. Appellee proceeded to make efforts to sell the property without avail and on December 23, 1911, he offered the land at public auction pursuant to a notice, both parties appear to have caused to be printed and posted. At this sale the land was bid off at \$98.25 an acre, but for some reason the bidder failed to complete the purchase. One of the bidders at the sale was Samuel Gehrig, who lived at New Douglas and after the bidder at the sale had failed to complete his purchase, appellant had an interview with Gehrig in which she tried to sell the land to him for \$100.00 an acre, and later had some correspondence with him in regard to the sale. In a letter written to her by Gehrig on December 1, 1910, he asked for the "lowest cash dollar per acre" that would buy the premises in question and requested her not to refer him to any agent or attorney as he wanted to deal directly with the owner. Appellant however, wrote to appellee and sent him this letter. Later on August 5, 1912, appellee, as agent for appellant, entered into a written agreement with Gehrig for the sale of the premises at \$98.00 per acre. Appellant then wrote to appellant, who was residing at Ferguson, Missouri, that he had made a

ment with appellant, his sister, a woman 68 years of age, who had been employed as a cook for several years in and about St. Louis, Missouri, to sell 30 acres of land she owned near the village of New Douglas, in said Madison county, and the employment was evidenced by a written instrument, signed by her in January, 1910, which stated that appellant employed appellee to sell said real estate for the price of \$75.00 an acre to her; that appellee should be entitled to his commission, or compensation, for selling the property, to all over and above the sum of \$75.00 per acre, for which said property might be sold; that appellant should pay the fees and expenses for the deed and abstract and other fees which might be necessary to perfect the title to said premises and release the mortgage liens. Appellee proceeded to make efforts to sell the property without avail and on December 23, 1911, he offered the land at public auction pursuant to a notice, both parties appear to have caused to be printed and posted. At this sale the land was bid off at \$98.25 an acre, but for some reason the bidder failed to complete the purchase. One of the bidders at the sale was Samuel Gehrig, who lived at New Douglas and after the bidder at the sale had failed to complete his purchase, appellant had an interview with Gehrig in which she tried to sell the land to him for \$100.00 an acre, and later had some correspondence with him in regard to the sale. In a letter written to her by Gehrig on December 1, 1910, he asked for the "lowest cash dollar per acre" that would buy the premises in question and requested her not to refer him to any agent or attorney as he wanted to deal directly with the owner. A appellee however, wrote to appellee and sent him this letter. Later on August 5, 1912, appellee, as agent for appellant, entered into a written agreement with Gehrig for the sale of the premises at \$98.00 per acre. Appellee then wrote to appellant, who was residing at Ferguson, Missouri, that he had made a



sale of the premises and asking her to come to New Douglas. She replied on August 15, 1912, that she would come over and that it would suit her to make the arrangements on Monday the 26th. At the time named she was at New Douglas, where she arranged with appellee and Gehrig to go to Edwardsville to execute the conveyance two days later. At the appointed time she executed her deed of conveyance to Gehrig, who paid her the purchase price. Appellee then demanded that she pay him the difference between \$75.00 and \$98.00 an acre for the premises, amounting to \$690.00, according to what he claimed to be the terms of his employment, but she refused to pay him and he thereupon brought this suit to recover it.

The contention of appellant that the contract of employment relied upon by appellee, was and is unilateral and void for want of mutuality, cannot be sustained. It amounted in effect to a written memorandum of employment, under which appellee proceeded to seek for a purchaser, his labors resulting as he claims, in securing one to whom the premises were conveyed by appellant and by whom she was paid the purchase money.

In *Raphael v. Hartman* 87 Ill. App. 634. where a contract had been signed by certain persons employing appellant Raphael to sell goods as a traveling agent, the question was raised as to whether, as Raphael had not signed it, it was in fact a mutual contract. The appellate court of the first district said, "The contract is in our opinion mutual because it is an undertaking by Raphael on the one part to devote his time, energy and attention for the period specified to the sale of the goods of his employers, and in consideration of that undertaking they, on their part, agree to pay him his salary and traveling expenses. The contract is none the less mutual because it is not signed by Raphael for the reason that ~~he~~ <sup>XXX</sup> he accepted it and worked under it, until he was discharged.

Appellant's complaint in regard to the exclusion of her

sale of the premises and asking her to come to New Douglas. She replied on August 13, 1912, that she would come over and that it would suit her to make the arrangements on Monday the 26th. At the time named she was at New Douglas, where she arranged with appellee and Gentry to pay to appellee the sum of \$25.00 and two days later. At the appointed time she executed her deed of conveyance to Gentry, who paid her the purchase price. Appellee then demanded that she pay him the difference between \$75.00 and \$25.00 as a note for the premises, amounting to \$50.00, according to what he claimed to be the terms of the agreement, but she refused to pay him and he thereupon brought this suit to recover.

The contention of appellee that the contract of employment relied upon by appellee, was and is null and void for want of mutuality, cannot be sustained. It amounted in effect to a written memorandum of employment, under which appellee proceeded to seek for a purchaser, his labors resulting as he claims, in securing one to whom the premises were conveyed by appellee and by whom she was paid the purchase money.

In *Raphael v. Harrison*, 111 Ark. 624, there is a contract had been signed by certain persons to sell goods as a traveling agent, the question was raised as to whether, as Raphael had not signed it, it was in fact a mutual contract. The appellate court of the first district said, "The contract is in our opinion mutual because it is an undertaking by Raphael on the one part to devote his time, energy and attention for the period specified to the sale of the goods of his employers, and in consideration of that undertaking they, on their part, agree to pay him his salary and traveling expenses. The contract is none the less mutual because it is not signed

by Raphael for the reason that he accepted it and worked under it, until he was discharged.

Appellant's complaint in regard to the exclusion of her

evidence is that she was not permitted to show that she had expended a large sum of money, amounting to over \$500.00 to perfect the title to her property and pay the interest on the mortgage, after appellee claims he was employed by her to sell the same. We think this evidence was not competent and was properly excluded as the contract itself provided that appellant should "pay fees and expenses for deed, abstract and other fees, which may be necessary to perfect title to said premises and release mortgage liens."

What we have above said in reference to the validity of the contract between the parties hereto, disposes of the objection of appellant to the third instruction given for appellee. The other criticism of the rulings of the court in reference to the instructions, relate to the modification of appellant's second and fourth instructions. These instructions told the jury that appellant had a right to revoke the contract and thereby deprive appellee of proceeding further thereunder, and that if the contract was so revoked, appellee could not recover in this suit. They were modified by the court so as to require such revocation to have taken place prior to the execution of the contract of sale between appellee, as agent of appellant and Samuel Gehrig. This modification was proper for, if the contract appointing appellee agent, was in force at the time he made the sale of the premises to Gehrig, he was entitled to his compensation and appellant could not deprive him thereof by an attempted revocation of his authority thereafter. The gist of the controversy between the parties, on the facts related to the question whether appellant had or had not revoked appellee's authority to sell the premises before the contract of sale was entered into by him, as agent for appellant with Gehrig. Appellant testified that she wrote to appellee, revoking his authority to sell about January 1, 1911, and also at other times thereafter; that just before the deed was made, she asked him concerning his charges and he said "nothing -

evidence is that she was not permitted to show that she had expended a large sum of money, amounting to over \$800.00 to perfect the title to her property and pay the interest on the mortgage, after appellee claimed he was employed by her to sell the same. We think this evidence was not competent and was properly excluded as the contract itself provided that appellant should "pay fees and expenses for deed, abstract and other fees, which may be necessary to perfect title to said premises and release mortgage liens."

What we have above said in reference to the validity of the contract between the parties hereto, disposed of the objection of appellant to the third instruction given for appellee. The other criticism of the rulings of the court in reference to the instructions, relate to the modification of appellant's second and fourth instructions. These instructions said the fact that appellant had a right to revoke the contract and thereby deprive appellee of proceeding further thereunder, and that if the contract was so revoked, appellee could not recover in this suit. They were modified by the court so as to require such revocation to have taken place prior to the execution of the contract of sale between appellee, as agent of appellant and Samuel Gehrig. This modification was proper for, if the contract appointing appellee agent, was in force at the time he made the sale of the premises to Gehrig, he was entitled to his compensation and appellant could not deprive him thereof by an attempted revocation of his authority thereafter. The gist of the controversy between the parties, on the facts related to the question whether appellant had or had not revoked appellee's authority to sell the premises before the contract of sale was entered into by him, as agent for appellant with Gehrig. Appellant testified that she wrote to appellee, revoking his authority to sell about January 1, 1911, and also at other later dates; that just before the deed was made, she asked him concerning his charges and he said "nothing -



--if I wanted to give him anything it was all right." Appellee denied that he made this statement and also that there was any revocation of his authority. He also testified that when the appellant came over to close the trade she said, "I am glad you sold it; you will get your money and I will get mine." This statement was in turn denied by appellant. It will thus be seen that the testimony of the two parties was contradictory and irreconcilable and it was therefore the province of the jury, who saw them and heard them testify, to decide which was entitled to the greater credit and to determine therefrom and from all the other testimony, facts and circumstances in the case, whether or not appellee's authority to act as agent, had been revoked prior to the sale of the premises. We find in the record no reason to disturb the judgment of the court below in this case and the same will therefore be affirmed.

Judgment Affirmed.

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(To be published in abstract only.)



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Judgment Affirmed.

(To be published in abstract only.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 9th day of October, A. D. 1913.

*A. C. Millspaugh*

Clerk of the Appellate Court.

# OPINION

*Fee \$*

2A 566

361

# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon on the Fourth Tuesday in the month of March in the year of our LORD, one thousand nine hundred and thirteen, the same being the 25th day of March, in the year of our LORD, one thousand nine hundred and thirteen.

Present:

Hon. JAMES C. McBRIDE, Presiding Justice.

Hon. OWEN P. THOMPSON, Justice.

Hon. HARRY HIGBEE, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff.

And afterwards in Vacation, after said March Term, to-wit: On the 9th day of October, A. D. 1913, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

183 I.A. 566

ERROR TO,  
APPEAL FROM

Long

Circuit COURT

No. 39 vs.

March Term, 1913.

Perry COUNTY

Long

TRIAL JUDGE  
Hon. Goddard





March Term, A. D. 1913.

Sarah M. Long,

Appellee,

vs.

Hugh H. Long,

Appellant.)

Appeal from Perry.

## 183I.A. 566

Opinion by Higbee, J.

On October 12, 1912, appellee filed her bill for separate maintenance against her husband Hugh H. Long, the appellant. The bill sets out their marriage on September 20, 1908; that they lived together until September 19, 1911, when appellant went to the Soldiers Home at Quincy, Illinois; that at such time he agreed he would make such provision as would enable her to secure the necessaries of life and give her comfortable living, such as he was amply able to give her; that he had failed to comply with said agreement; that he had published a notice in the city papers of Duquoin, forbidding any one to extend credit to her for the necessaries of life, in her name and other wise curtailed and shut off her allowance and support; that for many months she had not received from him support sufficient to provide her with the necessaries and conveniences of life; that although amply able to make suitable provision for her, according to her condition in life, appellant refused so to do; that appellee is physically weak and unable to earn her living at any sort of work.

Appellant's answer denies the allegations of the bill, admits that for the past few months he had not contributed to the support of appellee but states that she was not without means of support, but that she owned the home where she lived worth \$2,000.00 and had some \$75.00 in money loaned and further denies that she was entitled to the relief prayed for by her.

It appeared from the proofs that appellant was a veteran of the civil war, receiving a pension of \$15.00 a month and owned

March Term, A. D. 1913.

Appeal from Perry.

Appellant.  
 Hugh H. Jones.  
 vs.  
 Appellee.  
 John H. Long.

1881.A.566

Opinion by Hibbee, J.

On October 12, 1912, appellee filed her bill for separate maintenance against her husband Hugh H. Long, the appellant. The bill sets out their marriage on September 20, 1900; that they lived together until September 19, 1911, when appellant went to the Soldiers Home at Quincy, Illinois; that at such time he agreed he would make such provision as would enable her to secure the necessities of life and give her comfortable living, such as he was amply able to give her; that he had failed to comply with said agreement; that he had published a notice in the city papers of Duquoin, forbidding any one to extend credit to her for the necessities of life, in her name and other wise entitled and shut off her allowance and support; that for many months she had not received from him support sufficient to provide her with the necessities and conveniences of life; that although amply able to make suitable provision for her, according to her condition in life, appellant refused so to do; that appellee is physically weak and unable to earn her living at any sort of work. Appellant's answer denies the allegations of the bill, admits that for the past few months he had not contributed to the support of appellee but states that she was not without means of support, but that she owned the home where she lived worth \$2,000.00 and had some \$100.00 in money loaned and further denies that she was entitled to the relief prayed for by her.

It appeared from the proofs that appellant was a veteran of the civil war, receiving a pension of \$12.00 a month and owned

some eight or nine houses and lots in the city of Duquoin, from which he received rent, worth probably \$5,000.00. Appellee also owned a five room cottage in said city where she lived, worth from ~~\$800.00~~ \$800.00 to \$1,100.00 and had between \$600.00 and \$700.00 in money. After the marriage they bought two houses, to pay for which each contributed the sum of \$430.00, the title being taken to them jointly. Appellant afterwards became paralyzed and helpless and some months later, he went to the Soldier's and Sailor's Home at Quincy, Illinois. When appellant left it was agreed between him and appellee that she should have the rent of the two houses owned jointly, amounting to \$11.00 a month and that appellant should send her \$25.00 each quarter out of his pension, which has since been increased from \$15.00 to \$30.00 a month. Appellant sent \$25.00 the first quarter, \$15.00 the next and none since then. He caused his agent to take the rent of one of their joint houses from her and notified store keepers through the newspapers, not to sell her goods on his account. At the time of the trial it was shown appellee was crippled, her right arm having been broken so that she could not sew to assist in earning her living and that her income was limited to the rent from one of the joint houses still under her control and the interest on \$250; that appellant was possessed of property worth from \$5,000.00 to \$6,000.00; was drawing a pension of \$30.00 a month which appellee had asked the pension department to divide with her and was living at the Soldier's and Sailor's Home of the state.

The decree found that during the time appellant and appellee lived together, she faithfully performed all her duties as wife and at all times treated appellant with kindness and forbearance; that on September 19, 1911, appellant left her home and has continued to absent himself therefrom; that since said time appellee has not received from him support sufficient to provide her necessities and conveniences of life and that for many months he has refused and neglected to provide for her; that he is possessed





of personal and real property of the value, approximately of \$5,000.00 and that appellee is living separate and apart from appellant without her fault. It was decreed that appellee was entitled to separate maintenance from appellant and that he pay to her the sum of \$25.00 a month less such amount as she might succeed in getting allowed to her by the United States government ~~for~~ from his pension.

It is the contention of appellant that the proofs fail to show that appellee was living separate and apart from her husband without her fault. A consideration of the proofs in the case however, leads us to the conclusion that they disclose a state of facts which entitled her, under the statute, to separate maintenance and that the amount allowed her by the court is, under all the circumstances, quite reasonable. She was about 60 years of age, crippled so that she could not earn her livelihood had she attempted to do so and under all the circumstances and including the financial condition of the parties, the allowance of \$25.00 a month made to her by the court, appears very reasonable.

Appellant complains that the trial court erred in not admitting in evidence a bill for divorce, filed by her against appellant at a previous term of court. The fact that appellee had previously brought a suit for divorce was shown by her testimony in the case, but we are unable to say whether the contents of the bill filed by her, would have been properly admitted in evidence or not as the same has not been preserved in the record for our inspection. The decree of the court below will be affirmed.

Affirmed.

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(To be published in abstract only.)



to her the sum of \$25.00 a month less such amount as she might be entitled to separate maintenance from appellant and that he pay appellant without her Tenant. It was decreed that appellee was \$5,000.00 and that appellee is living separate and apart from appellant and real property of the value, approximately of

...and the ...

It is the contention of appellant that the proofs fail to show that appellee was living separate and apart from her husband with out fault. A consideration of the proofs in the case however, leads us to the conclusion that they disclose a state of facts which entitled her, under the statute, to separate maintenance and that the amount allowed her by the court is proper in all the circumstances. We are of the opinion that the judgment of the court should be affirmed.

2006/06/01

Appellant complains that the trial court erred in not ad-

There is no evidence in evidence a bill for divorce, filed by her against defendant at a previous term of court. The fact that appellee had previously brought a suit for divorce was known by all parties to the case, and we are unable to say whether the bill filed by the plaintiff is void, voidable or merely defective. The bill is void in evidence or not taken into account is not a question to be decided by the court below. The decision of the court below will be affirmed.

1995-1996

body 172A

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(To be published in abstract only.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 9th day of October, A. D. 1913.

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Clerk of the Appellate Court.

# OPINION

Fee \$ . . . . .

A 577

364

# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon on the Fourth Tuesday in the month of March in the year of our LORD, one thousand nine hundred and thirteen, the same being the 25th day of March, in the year of our LORD, one thousand nine hundred and thirteen.

Present:

Hon. JAMES C. McBRIDE, Presiding Justice.

Hon. OWEN P. THOMPSON, Justice.

Hon. HARRY HIGBEE, Justice.

J. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff.

And afterwards in Vacation, after said March Term, to-wit: On the 9th day of October, A. D. 1913, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

183 I.A. 577

Roach

~~ERROR TO~~  
APPEAL FROM

No. ✓ ✓ vs.

Circuit COURT

March Term, 1913.

Randolph COUNTY

Willis Coal & M. Co

TRIAL JUDGE  
Hon. Geo A. Crew





Term No. 44.

Agenda No. 30.

March Term, A. D. 1913.

|                        |   |                       |
|------------------------|---|-----------------------|
| Patrick Roach,         | ) |                       |
|                        | ) |                       |
| vs.                    | ) | Appeal from Randolph. |
|                        | ) |                       |
| Willis Coal and Mining | ) |                       |
| Company,               | ) |                       |
|                        | ) |                       |
| Appellant.)            | ) |                       |

183 I.A. 577

Opinion by Higbee, J.

This is an appeal from a judgment in favor of appellee for damages sustained by him, while in the employ of appellant.

The first count of the declaration alleged that on April 28, 1911, and for sometime before, there existed in the roof of the room where appellee was working, above the working place therein, a lot of loose dirt, rock, clod and slate and other substances which were likely to come down and injure men engaged in mining therein and which constituted an unsafe and dangerous condition known to appellant; that appellant wilfully allowed appellee to enter said room for work without the direction of a mine manager, before said unsafe condition was made safe, by means whereof a lot of said loose dirt, rock, clod and other substances fell upon and injured him. The second count alleged that appellant's mine examiner went into appellee's room and saw and observed overhanging slate, rock and white top, and saw and observed the same was unsafe and dangerous and wilfully failed and omitted to place a conspicuous mark thereat, as notice to all men to keep out. The third alleged a wilful failure on the part of appellant to furnish props, caps and timbers demanded by him, with which to properly secure his working place. There have been two trials of this case in the court below, both of which resulted in a verdict in favor of appellee. Appellant claims that the judgment appealed from, should be reversed because the verdict was not sustained by the weight of the evidence

March Term, A. D. 1913.

Appeal from Randolph.

Appellant,  
William Coal and Mining  
Company,  
vs.  
Appellee,  
George E. Lamb.

1881 A. 577

Opinion by Nibbee, J.

This is an appeal from a judgment in favor of appellee for damages sustained by him, while in the employ of appellant. The first count of the declaration alleged that on April 28, 1911, and for sometime before, there existed in the roof of the room where appellee was working, above the working place therein, a lot of loose dirt, rock, cleft and slate and other substances which were likely to come down and injure men engaged in mining therein and which constituted an unsafe and dangerous condition known to appellant; that appellant willfully allowed appellee to enter said room for work without the direction of a mine manager, before said unsafe condition was made safe, by means whereof a lot of said loose dirt, rock, cleft and other substances fell upon and injured him. The second count alleged that appellant's mine examiner went into appellee's room and saw and observed overhanging slate, rock and white top, and saw and observed the same was unsafe and dangerous and willfully failed and omitted to place a conspicuous mark thereat, as notice to all men to keep out. The third alleged a willful failure on the part of appellant to furnish props, caps and timbers demanded by him, with which to properly secure his working place. There have been two trials of this case in the court below, both of which resulted in a verdict in favor of appellee. Appellant claims that the judgment appealed from, should be reversed because the verdict was not sustained by the weight of the evidence.

and there was reversible error in some of the instructions given for appellee.

On the day of the injury, as it appears from the proofs, appellee and his buddy, Watkins, were employed mining coal in one of the rooms of appellant's mine, which was some 12 to 14 feet wide. A track over which coal cars ran, extended to within 10 or 12 feet of the face. The room had originally been about 27 feet wide but on account of white top or soap stone, as it was sometimes called in the evidence, appearing in the roof, it was thought necessary to narrow the room down to the width above named. It was shown that it was difficult to determine whether a roof in which there was white top, was safe or not; that it might look and sound solid and yet give way and come down suddenly without any warning. Two men went ahead of appellee and Watkins and undercut the coal at the face with a mining machine. Appellee and his buddy then drilled holes in the ledge that was left, prepared and fired the shots and loaded the coal on the cars to be hauled out. On the morning of Wednesday preceding the Friday on which appellee was injured, the two miners discovered a piece of white top extending out from the corner of the room. After working there a short time, they went to work in another room and thereafter the machine men again undercut the coal, and Thursday evening Watkins shot it down. Friday morning the mine examiner went into the room, examined the roof and marked the date of his visit, but made no danger mark. Appellee testified that afterwards, when he came to work, he found the roof in about the same condition it was on Wednesday and Watkins testified that no more of the white top was exposed on Friday than on Wednesday morning. Before going to work that morning, appellee sounded the roof and it sounded solid and at about 10 A. M. Ward, a miner and father-in-law of Watkins, came into the room and also sounded the roof and stated it sounded solid. Shortly thereafter a piece of

and there was reversible error in some of the instructions given for appellee.

On the day of the injury, as it appears from the proofs, appellee and his buddy, Watkins, were employed mining coal in one of the rooms of appellant's mine, which was some 12 to 14 feet wide. A track over which coal cars ran, extended to with-

in 10 or 12 feet of the face. The room had originally been about 27 feet wide but on account of white top or soap stone, as it was sometimes called in the evidence, appearing in the roof, it was thought necessary to narrow the room down to the width above named. It was shown that it was difficult to determine whether a roof in which there was white top, was safe or not; that it might look and sound solid and yet give way and come down suddenly without any warning. Two men went ahead of appellee and Watkins and undercut the coal at the face with a mining machine. Appellee and his buddy then drilled holes in the ledge that was left, prepared and fired the shots and loaded the coal on the cars as he pointed out. On the morning of

Wednesday preceding the Friday on which appellee was injured, the two miners discovered a piece of white top extending out from the corner of the room. After working there a short time they went to work in another room and thereafter the machine men again undercut the coal, and Thursday evening Watkins shot it down. Friday morning the mine examiner went into the room, examined the roof and marked the date of his visit, but made no danger mark. Appellee testified that afterwards, when he came to work, he found the roof in about the same condition it was on Wednesday and Watkins testified that no more of the white top was exposed on Friday than on Wednesday morning. Before going to work that morning, appellee sounded the roof and it sounded solid and at about 10 A. M. Ward, a miner and father-in-law of Watkins, came into the room and also sounded the roof and stated it sounded solid. Shortly thereafter a piece of



white top being approximately six and a half feet long by 4 feet wide and 20 inches thick, suddenly fell, catching appellee under it, breaking his wrist and several ribs and wounding one hip. Appellee testified that on Wednesday morning preceding the accident, he demanded of the mine manager, who came into his room, cross bars to be used to hold the white top in place, saying to him, "Fat, you want to get some crossbars to get that place cross barred. It is too dangerous to work in." He further testified the mine manager looked at the place, examined it, sounded it himself and said, "I will see about that." The manager denies that this demand for props or cross bars was made of him at said time, but states that about two weeks before the injury Watkins asked him to timber back in the room, to cross bar it, but that he did not cross bar it, that it was not necessary at all to put up cross bars in it.

It was a controverted question of fact as to whether there were props of the right length and caps to be used in supporting the roof, but it plainly appeared that there were no cross pieces. The mine manager, Flynn, testified that the piece of white top that fell on appellee on Friday, was not exposed to view while he was in the room on Wednesday and there was proof tending to show that the white top which appellee showed him was near the south east corner of the room, while the piece which fell extended in a southwesterly direction from the north east corner. The first two counts of the declaration stated that the loose dirt, rock, clod, slate, white top, and other substances were in the roof of the room, constituting an unsafe or dangerous condition on the day of the injury and that such unsafe or dangerous condition was known to appellant. That a piece of white top was in the roof of the room that morning, is not controverted, but the mine examiner, while stating he saw it, says he examined the roof and it sounded solid when struck by his rod; that while the



white top being approximately six and a half feet long by a feet wide and 20 inches thick, suddenly fell, catching appellee under it, breaking his wrist and several ribs and mashing one hip. Appellee testified that on Wednesday morning preceding the accident, he demanded of the mine manager, who came into his room, cross bars to be used to hold the white top in place, saying to him, "Wat, you want to get some crossbars to get that place cross barred. It is too dangerous to work in." He further testified the mine manager looked at the place, examined it, sounded it himself and said, "I will see about that." The manager denies that this demand for props or cross bars was made of him at said time, but states that about two weeks before the injury Watkins asked him to timber back in the room, to cross bar it, but that he did not cross bar it, that it was not necessary at all to put up cross bars in it.

It was a controverted question of fact as to whether there were props of the right length and caps to be used in supporting the roof, but it plainly appeared that there were no cross pieces. The mine manager, Ryan, testified that the piece of white top that fell on appellee on Friday, was not exposed to view while he was in the room on Wednesday and there was proof tending to show that the white top which appellee showed him was near the south east corner of the room, while the piece which fell extended in a southwesterly direction from the north east corner. The first two counts of the declaration stated that the loose dirt, rock, clod, slate, white top, and other substances were in the roof of the room, constituting an unsafe or dangerous condition on the day of the injury and that such unsafe or dangerous condition was known to appellee. That a piece of white top was in the roof of the room that morning, is not controverted, but the mine examiner, while stating he saw it, says he examined the

whitetop was there he found no slip or parting in it. He also stated that white top will sometimes sound solid and come down shortly afterwards; that it is liable to come down; that he had known this ever since he worked in the mines. Walter Powell, a miner who worked in this mine, said the roof was white top and that kind of material when discovered in a roof, is dangerous; that it is liable to fall down any minute if there is any break to it at all. Ward, another miner above referred to, testified he saw the white top in the roof on Wednesday morning, and again on the morning of the injury and that that kind of a roof is treacherous; that you cannot tell when it is liable to fall; that there is no way of determining how long it will stay up or when it will fall.

We are of opinion the proof as a whole, plainly sustains the allegations of the first two counts of the declaration. The evidence concerning the ~~dangerous~~ borges contained in the third count, ~~count~~ as to the alleged failure to furnish props, caps and timbers to properly secure the roof of the working place, was more conflicting and less satisfactory, but presented a state of facts which was properly left for the determination of a jury. The facts as a whole failed to disclose any sufficient reason why the verdict of the jury in this case, should not be sustained.

Appellant questions the accuracy of instructions 6 and 7 given for appellee. The sixth instruction told the jury that appellee was not required by law to prove all the counts of his declaration, but that it was sufficient if he proved one or more of the same as alleged therein by a preponderance or greater weight of all the evidence, to entitle him to a verdict. Appellant's criticism of this instruction appears to be, that the jury must have understood from it, that it was sufficient to entitle him to a recovery that appellee should prove one or two things in one or more of the various counts of the declaration. The instruction does not say this but states plainly that he

White top was there he found no slip or parting in it. He also stated that white top will sometimes sound solid and come down shortly afterwards; that it is liable to come down; that he had known this ever since he worked in the mine. Walter Powell, a miner who worked in this mine, said the roof was white top and that kind of material when discovered in a roof, is dangerous; that it is liable to fall down any minute if there is any break to it at all. Ward, another miner above referred to, testified near the white top in the roof on Wednesday morning, and again on the morning of the injury and that that kind of a roof is treacherous; that you cannot tell when it is liable to fall; that there is no way of determining how long it will stay up or when it will fall.

We are of opinion the proof as a whole, plainly sustaining the allegations of the first two counts of the declaration. The evidence concerning the ~~allegation~~ charges contained in the third count, ~~as to~~ the alleged failure to furnish props, caps and timbers to properly secure the roof of the working place, was more conflicting and less satisfactory, but presented a state of facts which was properly left for the determination of a jury. The facts as a whole failed to disclose any sufficient reason why the verdict of the jury in this case, should not be sustained.

Appellant questions the accuracy of instructions 6 and 7 given for appellee. The sixth instruction told the jury that appellee was not required by law to prove all the counts of his declaration, but that it was sufficient if he proved one or more of the same as alleged therein by a preponderance or greater weight of all the evidence, to entitle him to a verdict. Appellant's criticism of this instruction appears to be, that the jury must have understood from it, that it was sufficient to entitle him to a recovery that appellee should prove one or two things in one or more of the various counts of the declaration. The instruction does not say this but states plainly that he

must prove one or more counts of his declaration as alleged therein, and the interpretation given it by appellant, appears to us to be without foundation.

Appellee's instruction No. 7 told the jury that contributory negligence on the part of appellee was not a legal defense against a wilful violation of the miners law of this state. In the course of the trial, certain evidence was elicited which bore upon the question whether appellee himself, was or was not guilty of negligence. This instruction stated a correct principle of law and may have served a useful purpose in definitely banishing the question of contributory negligence from the consideration of the jury.

The statute in relation to Mines and Mining in existence at the time appellee was injured, was repealed and a new act in relation to the same <sup>subject</sup> enacted after appellee was injured but prior to the trial of this case. Appellant argues that by reason thereof, the court should have peremptorily instructed the jury to find the appellant not guilty as appellee's right of recovery was lost immediately upon the repeal of the statute in force at the time the injuries were received. The question here raised seems to us to be fully disposed of by section 4 chap. 131 of our Revised Statutes, <sup>(§ 4 + a. 4 11113)</sup> which provides, "No new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, and as to any offense committed against the former law, or as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to effect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued, or claim arising before the new law takes effect, save only that the proceedings thereafter, shall conform so far as practicable, to the laws in force at the time of such proceeding." By this stat-



most grave and of more count of his decision he alleged therein, and the interpretation given it by appellant, appears to us to be without foundation. Appellate's instruction No. 7 told the jury that contributory negligence on the part of appellee was not a legal defense against a willful violation of the statute of this state. In the course of the trial, certain evidence was admitted which bore upon the question whether appellee himself, was or was not guilty of negligence. This instruction stated a correct principle of law and may have served a useful purpose in assisting the jury in the question of contributory negligence from the consideration of the jury.

The statute in relation to Mines and Mining in existence at the time appellee was injured, was repealed and a new act in relation to the same enacted after appellee was injured, but prior to the trial of this case. Appellant argues that by reason thereof, the court should have peremptorily instructed the jury to find the appellant not guilty as appellee's right of recovery was lost immediately upon the repeal of the statute in force at the time the injuries were received. The question here raised seems to us to be fully disposed of by section 4 chap. 131 of our Revised Statutes, which provides, "No new law shall be construed to repeal a former law, unless such former law is expressly repealed or not, and as to any offense committed against the former law, or as to any act done, or any penalty, forfeiture or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to effect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued, or claim arising before the new law takes effect, save only that the proceedings thereafter, shall conform so far as practicable, to the laws in force at the time of such proceeding." By this statute



ute appellee's right to maintain his action under the law in existence at the time he was injured, is fully preserved. Layher vs. Chic-go-Sandoval Coal Co. , Ill. App. The judgment of the court below will be affirmed.

Affirmed.

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(To be published in abstract only.)

the results of the study in the form of a report to the  
authorities of the State of New York, to the  
New York State Department of Education, and to the  
of the State of New York.

ATTACHED

XXXXXXXXXXXXXXXXXXXX

XXXXXXXXXXXX

(Not published in abstract only.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 19th day of October, A. D. 1913.

A. C. MILLSPAUGH  
Clerk of the Appellate Court.

# OPINION

*Fee*

2A 587

366

# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon on the Fourth Tuesday in the month of March in the year of our LORD, one thousand nine hundred and thirteen, the same being the 25th day of March, in the year of our LORD, one thousand nine hundred and thirteen.

Present:

Hon. JAMES C. McBRIDE, Presiding Justice.

Hon. OWEN P. THOMPSON, Justice.

Hon. HARRY HIGBEE, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff.

And afterwards in Vacation, after said March Term, to-wit: On the 4<sup>th</sup> day of October, A. D. 1913, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

183 I.A. 587

Thomas v. Hartmann

ERROR TO  
APPEAL FROM

No. 55 vs.

City COURT

March Term, 1913.

C. St. Louis COUNTY

St. Louis Brewing Ass'n

TRIAL JUDGE  
Hon. R. H. Hannigan





Term No. 55.

Agenda No. 48.

March Term, A. D. 1913.

Thomas & Hoeltman,  
Appellee,  
vs.  
St. Louis Brewing Association,  
Appellant.)

Appeal from  
City Court of  
East St. Louis.

183 I.A. 587

Opinion by Higbee, J.

Appellee, a corporation, sued appellant, also a corporation, to recover its charges for transferring and storing a certain lot of hotel furniture upon which appellant held a chattel mortgage. The jury gave a verdict in favor of appellee for \$241.70, but a remittitur of \$20.00 was made, and judgment entered for \$221.70.

The question to be determined is whether, under the proofs appellant should be held liable to pay these charges. In the fall of 1909, the furniture was owned by one Miles Shevlin, who was using it in the Riverside hotel in St. Louis, Missouri. At that time the city of East St. Louis was arranging to construct a large sewer through the southern part of the city and Shevlin decided to move the furniture from his hotel and establish a boarding camp and saloon near the contemplated work, for the purpose of boarding and doing business with the employees connected therewith. The Anheuser-Busch Brewery had a chattel mortgage upon the Riverside Hotel furniture for several hundred dollars, and objected to the removal of said effects, without the payment of their claim. Shevlin applied to persons connected with the Heim Brewery, who had charge of the East St. Louis branch of appellant's business and made arrangements for a loan of \$600.00 to satisfy the Anheuser-Busch claim. Robert Bethmann, the manager of appellant's East St. Louis branch, made the loan, giving a check for

March Term, A. D. 1915.

Appeal from  
City Court of  
East St. Louis.

1881.A.587

Thomas & Hoeltzman,  
Appellee.

vs.

St. Louis Brewing Associa-  
tion,  
Appellant.

Opinion by Hughes, J.

Appellee, a corporation, sued appellant, also a corpora-  
tion, to recover its charges for transferring and storing a cer-  
tain lot of hotel furniture upon which appellant held a chattel  
mortgage. The jury gave a verdict in favor of appellee for  
\$241.70, but a remittitur of \$20.00 was made, and judgment en-  
tered for \$221.70.

The question to be determined is whether, under the facts  
appellant should be held liable to pay these charges. In the  
fall of 1909, the furniture was owned by one Miles Chevin, who  
was using it in the Riverside hotel in St. Louis, Missouri. At  
that time the city of East St. Louis was arranging to construct  
a large sewer through the southern part of the city and Chevin  
decided to move the furniture from his hotel and establish a

boarding camp and saloon near the contemplated work, for the pur-  
pose of boarding and doing business with the employees connected  
therewith. The Anheuser-Busch Brewery had a chattel mortgage upon  
the Riverside Hotel furniture for several hundred dollars, and

objected to the removal of said effects, without the payment of  
their claim. Chevin applied to persons connected with the Hein-  
Brewery, who had charge of the East St. Louis branch of appellant's  
business and made arrangements for a loan of \$600.00 to satisfy  
the Anheuser-Busch claim. Robert Bateman, the manager of appel-  
lant's East St. Louis branch, made the loan, giving a check for

the amount required to Jerry J. Kane, its sales manager, who paid off the debt, and afterwards a chattel mortgage on said furniture, to secure the debt, was executed and delivered to appellant. Shevlin then engaged appellee to move the property. About the time appellee's team commenced to move the furniture, J. M. Thomas of the Thomas & Noeltmann corporation, learned that appellant had a chattel mortgage upon the property. He testified that he thereupon called up Mr. Bethmann on the telephone, and asked him what to do with the property; that Bethmann told him to "store it in the Heim Brewery's name and send them a warehouse receipt and to give it to no body except on a written order from them"; that he stored the goods and sent the warehouse receipt to the Heim Brewery with a letter. The receipt which was introduced in evidence, contained among other things the following statements: "Received the following named articles, goods wares or merchandise as listed below.... to be stored in warehouse No. 1 at Ninth and L. & N.R. R., for the term of six months, only unless storage charges are paid monthly, for account of Heim Brewery, and to be delivered unto Heim Brewery or order only, on return of this warehouse receipt and upon payment of all charges in full as set forth below.....

Storage per month for lot --- \$19.00  
Moving to warehous-----\$127.00"

The above was followed by a list of the articles of property received by appellee. The letter which accompanied the receipt, was as follows:

"East St. Louis, Ill., 12/2, 1909.

Heim Brewery,

City.

Gentlemen: I enclose please find warehouse receipt for goods stored by you a/c M. Shevlin. Mr. Shevlin has had a party or two to come and look at these goods. However, nothing will leave here unless you give us orders to do so. Kindly acknowledge receipt of warehouse receipt and oblige, Yours truly,





Thomas & Hoeltmann,

Per F. T. Hoeltmann."

This receipt was retained by the Heim Brewery and about April 1, 1910, the mortgage was foreclosed by appellant and at the sale was bid in by it. The sale was made at the brewery but the goods were not taken from appellee's warehouse. On May 2, Mr. Kane, agent for the Heim Brewery branch of appellant, sent a man with the warehouse receipt and a request to appellee to deliver to the Brewery, a portion of the property named in the receipt. The articles taken were noted on the warehouse receipt and receipted for on the order by appellant's driver, who took them and the receipt away. The receipt was retained by appellant until about two weeks later, when it was returned to appellee and the balance of the goods taken away by appellant. Mr. Bethmann denied that he had the conversation with Thomas over the telephone concerning the goods in question, testified to by the latter. He also swore that he received the warehouse receipt and letter above referred to from appellee; that he found the same on his desk and did not keep them for more than an hour; that he gave the receipt to the book keeper to return to appellee with instructions that "we were not responsible." It appeared however, that if the instruction to return the receipt was given, it was not carried out as the same remained in the possession of appellant and was not delivered by them until all the goods were surrendered. The amount claimed by appellee in the bill, included the charges for hauling nineteen loads from the Riverside Hotel, St. Louis, Missouri, to appellee's warehouse in East St. Louis, Illinois, and three loads from the Riverside Hotel to the camp at East St. Louis at \$5.00 a load, making \$110.00, bridge fare advanced, \$17.70 and storing nineteen loads of furniture for six months at \$19.00 a month, \$114.00 making a total of \$241.70. Of this amount \$20.00 was afterwards remitted

For E. T. Hoffmann."

This receipt was retained by the Heim Brewery and about April 1, 1910, the mortgage was foreclosed by appellant and at the same time sold in by it. The sale was made of the property but the goods were not taken from appellee's warehouse. On May 2, Mr. Kane, agent for the Heim Brewery branch of appellee, sent a man with the warehouse receipt and a request to appellee to deliver to the Brewery, a portion of the property named in the receipt. The articles taken were noted on the warehouse receipt and receipted for on the order by appellee's driver, who took them and the receipt away. The receipt was retained by appellee until about two weeks later, when it was returned to appellee and the balance of the goods taken away by appellee. Mr. Hoffmann denied that he had the conversation with Thomas over the telephone concerning the goods in question, testified to by the latter. He also swore that he received the warehouse receipt and letter above referred to from appellee; that he found the same on his desk and did not keep them for more than an hour; that he gave the receipt to the book keeper to return to appellee with instructions that "we were not responsible." It appeared, however, that if the instruction to return the receipt was given, it was not carried out as the same remained in the possession of appellee and was not delivered by them until all the goods were surrendered. The amount claimed by appellee in the bill, included the charges for handling nineteen loads from the Riverside Hotel, St. Louis, Missouri, to appellee's warehouse in East St. Louis, Illinois, and three loads from the Riverside Hotel to the camp at East St. Louis at \$5.00 a load, making \$10.00, bridge fare advanced, \$17.70 and storing nineteen loads of furniture for six months at \$19.00 a month, \$341.00 making a total of \$341.70. Of this amount \$20.00 was afterwards remitted

to cover the hauling and bridge fare of the three loads taken to the camp. Thomas further testified on the trial, that when he went to see Mr. Bethmann about his bill he said, "The stuff had cost him six or seven hundred dollars" and told him to see Mr. Kane; that he then went to see Mr. Kane who told him "to let the matter rest for a few days as he thought he had a prospective buyer" and this conversation is substantially admitted by Mr. Kane.

Appellant's position is, that it is not liable for the debt because it did not own the property and did not order it hauled or stored but that even if it should be held liable under the proofs for storage, it should not be held for hauling and bridge fare, as the hauling was arranged for by Shevlin and that an order to store the goods would not include an agreement to pay for hauling the same across the river and paying the bridge fare thereby incurred. We are of opinion that as a whole the proofs sustained the claim of appellee, that appellant obligated itself to pay not only the storage charges, but also the hauling including the bridge fare. The receipt which was sent to appellant, plainly indicated to it that the goods were stored for the Heim Brewery and were to be delivered to it or its order only on return of the warehouse receipt, and the payment of all charges in full as set out therein, which included the charge of \$127.70 for the hauling and bridge fare. Appellant retained this receipt and relied upon it and when it desired to take any of the goods it produced the receipt to appellee. It also depended upon the receipt to show its possession of the goods and when it made the sale of the same under the chattel mortgage, no actual possession was taken of them but the sale was made at the brewery, the goods remaining at the warehouse and the only evidence of possession of the goods, which appellee had, was the warehouse receipt. Appellant cannot be permitted to rely on the receipt as it did, for the purposes named and repudiate that portion of it, which plainly

to cover the landing and bridge late of the same goods when to  
the camp. Thomas further testified on the trial, that when he  
went to see Mr. Hoffmann about his bill he said, "The stuff had  
cost him six or seven hundred dollars" and told him he was in  
trouble; that he then went to see Mr. Kane who told him to let the  
matter rest for a few days as he thought he had a prospective  
buyer, and this conversation is substantially admitted by Mr. Kane.  
Appellant's position is, that it is not liable for the debt  
incurred if did not own the property and did not order it loaded  
or stored but that even if it should be held liable under the  
goods for storage, it should not be held for landing and bridge  
late, as the landing was arranged for by Heavin and that an  
order to store the goods would not include an agreement to pay  
for landing the same across the river and using the bridge late  
freely furnished. He is of opinion that as a whole the goods  
sustained the claim of appellee, that appellee obtained it  
paid to pay not only the storage charges, but also the landing  
including the bridge late. The receipts which were sent to appel-  
lant, plainly indicated to it that the goods were stored for the  
Kain Brewery and were to be delivered to it or its order only  
on return of the warehouse receipt, and the payment of all charges  
even toll as set out therein, which included the charge of \$17.75  
for the landing and bridge late. Appellant testified that it  
and relied upon it and when it desired to take any of the goods  
it produced the receipt to appellee. It also depended upon the  
receipt to show the possession of the goods and when it made the  
sale of the same under the chattel mortgage, no actual possession  
was taken of them but the sale was made at the brewery, the goods  
remaining at the warehouse and the only evidence of possession of  
the goods, which appellee had, was the warehouse receipt. Appel-  
lant cannot be permitted to rely on the receipt as it did, for  
the goods named and requisite description of it, which plainly

indicated to it that the goods were held for it on condition that all charges for storage and moving to warehouse, should be paid and that the said goods should be delivered to them only upon the payment of such charges.

The proofs in the case clearly sustain the judgment of the court below and as no errors are complained of in the conduct of the trial and none appear to us from the record, the judgment of the court below will be affirmed.

Judgment Affirmed.

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(TO BE PUBLISHED IN ABSTRACT ONLY.)



indicated to it that the goods were held for it on condition  
that all charges for storage and moving to warehouse, should  
be paid and that the said goods should be delivered to them af-  
ter upon the payment of such charges.

The proofs in the case clearly sustain the judgment of  
the court below and as no errors are complained of in the con-  
duct of the trial and none appear to us from the record, the  
judgment of the court below will be affirmed.

Judgment Affirmed.

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(TO BE RETURNED IN ABSTRACT ONLY.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court  
at Mt. Vernon, this 9th day of October,  
A. D. 1913.

A. C. Millsbaugh  
Clerk of the Appellate Court.

# OPINION

*Fee \$ .*

267

# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon on the Fourth Tuesday in the month of March in the year of our LORD, one thousand nine hundred and thirteen, the same being the 25th day of March, in the year of our LORD, one thousand nine hundred and thirteen.

Present:

Hon. JAMES C. McBRIDE, Presiding Justice.

Hon. OWEN P. THOMPSON, Justice.

Hon. HARRY HIGBEE, Justice.

J. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff.

And afterwards in Vacation, after said March Term, to-wit: On the 25th day of October, A. D. 1913, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

1831A. 588

City of Centralia

**ERROR TO  
APPEAL FROM**

No. 66

vs.

Circuit

COURT

March Term, 1913.

Marion

COUNTY

Kuash

TRIAL JUDGE

Hon.

Am Rose





Term No. 66.

Agenda No. 60.

March Term, A. D. 1913.

City of Centralia, )  
                    Appellee, )  
vs.                    )                    A ppeal from Marion.  
J o h n   K n a s h, )  
                    Appellant. )

1831.A. 588

Opinion by Higbee, J.

Appellee has filed no brief in this case and the judgment of the court below might for that reason be reversed pro forma under rule 27 of this court which provides that such action shall be taken by the court, where the appellee fails to file briefs within the time provided for by the rules "unless on an examination of the record the court shall deem it proper to decide the case upon its merits." Having examined the record in the case, we have concluded that the interests of justice will be best subserved by giving the case a full consideration and deciding it upon its merits, as they appear to us.

Appellant, John Knash, was convicted before a justice of the peace of the violation of an ordinance of the city of Centralia, charging him with disturbing the peace. Upon appeal to the circuit court of Marion County, Illinois, he was again found guilty and has brought the case to this court for review.

It was shown by the proofs that on August 30, 1911, at about 8 o'clock P. M. one Ralph Fuller, came from a saloon in the south part of Centralia and approached appellant and his partner Leiron, who were butchers and were standing in front of their place of business near the saloon and asked appellant for some gunny sacks. Knash replied that they had none to spare and that they needed what they had in their business. Fuller was dissatisfied with the refusal and persisted in his demand.

March Term, A. D. 1913.

A appeal from Verdict.

City of Centralia,  
Appellee,  
vs.  
John Knash,  
Appellant.

1831.A.588

Opinion by Hibbs, J.

Appellee has filed no brief in this case and the judgment of the court below might for that reason be reversed pro forma under rule 27 of this court which provides that such action shall be taken by the court, where the appellee fails to file briefs within the time provided for by the rules "unless on an examination of the record the court shall deem it proper to decide the case upon its merits." Having examined the record in the case, we have concluded that the interests of justice will be best subserved by giving the case a full consideration and deciding it upon its merits, as they appear to us.

Appellant, John Knash, was convicted before a Justice of the peace of the violation of an ordinance of the city of Centralia, charging him with disturbing the peace. Upon appeal to the circuit court of Marion County, Illinois, he was again found guilty and has brought the case to this court for review.

It was shown by the proofs that on August 30, 1911, at about 8 o'clock P. M. one Ralph Fuller, came from a saloon in the south part of Centralia and approached appellant and his partner Reison, who were butchers and were standing in front of their place of business near the saloon and asked appellant for some gunny sacks. Knash replied that they had none to spare and that they needed what they had in their business. Fuller was dissatisfied with the refusal and persisted in his demand.

Some conversation followed between them in the course of which appellant made a remark which caused his partner, Weiron, to laugh. This angered Fuller, who turned to Weiron and struck him. Appellant then started toward Fuller and as to what followed there is a controversy in the proof. Fuller testified that appellant grabbed him around the neck with his arms, choking him and also kicked him severely on the leg. A policeman who arrested the parties swore that appellant grabbed Fuller, that Fuller choked him off and then appellant turned around and kicked Fuller on the leg below the knee; that appellant kicked Fuller just as the latter ran around a post. On the other hand appellant swore that he started to grab Fuller to pull him away from his partner; that Fuller then started to run and that he did not kick him. A farmer who was engaged in untying his horse in front of the butcher shop, when the trouble occurred, testified that he saw appellant approach Fuller, who commenced backing; that he did not see appellant take hold of Fuller or kick him but that Knash could have kicked him and he not have seen it, for the reason that Fuller and Weiron were between him and appellant. Weiron testified that he did not see appellant do anything; that when Fuller hit witness it made him "somewhat dazed." This was all the proof on the question whether appellant kicked Fuller and under it the jury, who heard the testimony and saw the witnesses, were fully warranted in finding a verdict of guilty against appellant.

It is however contended by appellant, that the court erred in refusing to give two instructions offered by him. One of these told the jury that a by-stander could interfere to prevent an assault, using such force as might be necessary, provided that after the separation he did not follow up either of the parties and assault him. Even if this were proper under the circumstances of this case, it was not error to refuse it as it

Appellant made a remark which caused his partner, Nelson, to laugh. This angered Kuller, who turned to Nelson and struck him. Appellant then started toward Kuller and as he went toward there in a caskover in the pool. Kuller testified that appellant grabbed him around the neck with his arms, choking him and also kicked him severely on the leg. A policeman who arrested the parties swore that appellant grabbed Kuller that Kuller choked him off and then appellant turned around and kicked Kuller on the leg below the knee; that appellant kicked Kuller just as the latter ran around a post. On the other hand appellant swore that he started to grab Kuller to pull him away from his partner; that Kuller then started to run and that he did not kick him. A farmer who was engaged in unloading his horse in front of the butcher shop, when the trouble occurred, testified that he saw appellant approach Kuller, who came backing; that he did not see appellant take hold of Kuller or kick him but that Kneash could have kicked him and he not have seen it, for the reason that Kuller and Nelson were between him and appellant. Nelson testified that he did not see appellant do anything; that when Kuller hit witness it made him "remembered." This was all the proof on the question whether or not appellant kicked Kuller and under is the jury, who heard the testimony and saw the witnesses, were fully warranted in finding a verdict of guilty against appellant.

It is however contended by appellant, that the court erred in refusing to give two instructions offered by him. One of these told the jury that a bystander could intervene to prevent a fight from breaking out. The other instructed the jury that if a fight was in progress, a bystander could intervene to prevent it from continuing. The court refused to give these instructions. It was not error to refuse to give them.

stated an abstract proposition of law and did not apply it to this case. The other instruction told the jury, if they found from a preponderance of the evidence Fuller, assaulted Meiron and further believed that at the time of said assault, appellant as a by-stander, attempted to prevent such assault and separate Fuller and Meiron, using only such force as was necessary, and further believed from the evidence, that after Meiron and Fuller had separated appellant did not follow up and assault Fuller, they should find appellant not guilty. While the principle sought to be laid down by this instruction appears to us to be correct, yet we are of opinion the court did not err in refusing it, for the reason that it failed to require the jury to find from a preponderance of the evidence that Knash was attempting to prevent an assault at the time in question, but the only requirement in that regard was that they should "believe" that at the time of the assault he was so engaged.

We are the more inclined to this holding for the reason that the facts in the case seem to have been fully and properly presented to the jury and that upon the whole, substantial justice has been done. The judgment of the court below will accordingly be affirmed.

Judgment affirmed.

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(to be published in abstract only.)



stated an abstract proposition of law and did not apply it to this case. The other instruction told the jury, if they found from a preponderance of the evidence that appellant was guilty, and further believed that at the time of said assault, appellant as a by-stander, attempted to prevent such assault and separate Miller and Keaton, using only such force as was necessary, and further believed from the evidence, that after Miller and Keaton had separated appellant did not follow up and assault Miller, they should find appellant not guilty. While the principle sought to be laid down by this instruction appears to be correct, yet we are of opinion the court should not err in refusing it, for the reason that it failed to require the jury to find from a preponderance of the evidence that Keaton was attempting to prevent an assault at the time in question, but the only requirement in that regard was that they should "believe" that at the time of the assault he was so engaged.

We are the more inclined to this holding for the reason that the facts in the case seem to have been fully and properly presented to the jury and that upon the whole, substantial justice has been done. The judgment of the court below will accordingly be affirmed.

Judgment affirmed.

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(to be continued in next or only.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 9<sup>th</sup> day of October, A. D. 1913.

A. C. Millspaugh  
Clerk of the Appellate Court.

# OPINION

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375

# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon on the Fourth Tuesday in the month of March in the year of our LORD, one thousand nine hundred and thirteen, the same being the 25th day of March, in the year of our LORD, one thousand nine hundred and thirteen.

Present:

Hon. JAMES C. McBRIDE, Presiding Justice.

Hon. OWEN P. THOMPSON, Justice.

Hon. HARRY HIGBEE, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff.

And afterwards in Vacation, after said March Term, to-wit: On the 9<sup>th</sup> day of October, A. D. 1913, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

183 I.A. 616

~~ERROR TO~~  
APPEAL FROM

Hoods

vs.

No. 24

March Term, 1913.

Circuit COURT

Madison COUNTY

Village of Madison

TRIAL JUDGE

Hon. H. E. Hadley





Term No. 24.

Agenda No. 23.

March Term, A. D. 1913.

Minnie Woods, )  
 )  
Appellee, )  
vs. )  
Village of Madison, )  
Appellant.)

Appeal from the  
Circuit Court of  
Madison County.

183 I.A. 616

Opinion by Thompson, J.

This suit was brought to recover for a personal injury to appellee, claimed to have resulted to her through the negligence of appellant, in suffering its sidewalk to be in a bad state of repair. The trial resulted in a verdict and judgment for plaintiff.

Appellant claims here: First:- Admission of improper evidence, Second:- That the court erred in giving plaintiff's second instruction, Third:- That damages are excessive.

The instruction complained of is as follows, to-wit:

"The Court instructs the jury that if you find the defendant guilty, then in arriving at the amount of your verdict you have a right to take into consideration the nature and extent of the plaintiff's injuries, if any, as shown by the evidence; her pain and suffering, if any such pain and suffering has been shown by the evidence, and the effect of such injuries, if any, upon her ability to perform her usual duties, and all damages that the plaintiff has sustained, if any, as a direct and proximate result of such injury. But you should take into consideration only such elements of damages as have been alleged in the declaration, and which have been established by a preponderance of the evidence, if any."

The criticism is directed toward that part of the instruction which says "The jury in estimating plaintiff's damages may take

March Term, A. D. 1913.

Appeal from the  
Circuit Court of  
Madison County.

Minnie Woods,  
Appellee,  
vs.  
Village of Madison,  
Appellant.

1831 A. 616

Opinion by Thompson, J.

This suit was brought to recover for a personal injury to appellee, claimed to have resulted to her through the negligence of appellant, in suffering its sidewalk to be in a bad state of repair. The trial resulted in a verdict and judgment for plaintiff.

Appellant claims here: First:- Admission of improper evi-

dence, Second:- That the court erred in giving plaintiff's

second instruction, Third:- That damages are excessive.

The instruction complained of is as follows, to-wit:

"The Court instructs the jury that if you find the defend-

ant guilty, then in arriving at the amount of your verdict you

have a right to take into consideration the nature and extent of

the plaintiff's injuries, if any, as shown by the evidence; her

pain and suffering, if any such pain and suffering has been

shown by the evidence, and the effect of such injuries, if any,

upon her ability to perform her usual duties, and all damages

that the plaintiff has sustained, if any, as a direct and prox-

imate result of such injury. But you should take into consid-

eration only such elements of damages as have been alleged in

the declaration, and which have been established by a prepon-

dance of the evidence, if any."

The criticism is directed toward that part of the instruction

which says "The jury in estimating plaintiff's damages may take

into consideration the effect of such injuries if any upon her ability to perform her usual duties."

If the usual duties referred to in the instruction was intended to mean, and was understood by the jury to mean only such household duties as a wife usually performs for the husband and family, the instruction would be erroneous. Village of Westville vs. Horn, 117 App., 89. Blair vs. Bloomington & Normal Ry. Co., 130 App., 400.

In the case of the City of Joliet vs. Conway, 119 Ill. 489, the Court said; "undoubtedly the law is, that the damages must be such as the plaintiff herself sustained, and the evidence confined to proof of such damages and to facts that she had a family or that she had the care of or maintained it would form no proper element for consideration by the jury in fixing compensation." Appellee offered no evidence to show her family relation or that any one was dependent on her for maintenance. All the evidence on that question was brought out by appellant's counsel on cross-examination of appellee. The evidence which appellant complains of as improper is found in the following testimony of appellee and the ruling of the Court thereon:

In answer to a question concerning her ability to do house-work, appellee stated, "I used to have eight of them (boarders) and could do their washing, now I aint able to do my own washing, and I aint able to do my house-work like I did, all that I can't do, I just let go." This answer was objected to by counsel for appellant for the reason "that she was not keeping boarders, or lost anything keeping boarders."

The Court in ruling on the objection said, "I don't understand that was what she was getting at. The purpose is to show the condition of her arm."

To another question, appellee gave the following answer, "I

into consideration the effect of such injuries if any upon her ability to perform her usual duties."

If the usual duties referred to in the instruction were intended to mean, and was understood by the jury to mean only such household duties as a wife usually performs for the husband and family, the instruction would be erroneous. *Willingham v. Westville Co., 114 App., 28. Blair v. Birmingham & Normal Ry. Co., 120 App., 400.*

In the case of the *"City of Los Angeles v. City of Los Angeles"*, 129, the Court said: "Undoubtedly the law is, that the duties must be such as the plaintiff herself sustained, and the evidence confined to proof of such damages and to facts that she had a family or that she had the care of or maintained it would form no proper element for consideration by the jury in fixing compensation." Appellee offered no evidence to show any family relation or that any one was dependent on her for maintenance. All the evidence on that question was brought out by appellee's counsel in cross-examination of appellee. The evidence which appellee complained of as improper is found in the following testimony of appellee and the ruling of the Court:

Exhibit:

In answer to a question concerning her ability to do housework, appellee testified, "I used to take care of my housework, and could do their washing, now I ain't able to do my own washing, and I ain't able to do my house-work like I did, all that I can't do, I just let go." This answer was objected to by counsel for appellee for the reason "that she was not keeping house, etc., or doing anything keeping house."

The Court in ruling on the objection said, "I don't understand that was what she was getting at. The question is to know if

used to take in washing for other people, and I used to work, help clean up the house, and now I cannot do my own washing, and I aint able to hire much work, and I have to let my work go, on account of my hand hurt." To this answer attorney for appellant objected, and moved to exclude it.

The Court said; "The jury will disregard that part of the witness's answer with reference to not being able to hire someone to do her work. That part you will disregard entirely. Motion denied as to the balance."

There was no attempt by appellee<sup>to</sup> show that appellee had a family or that she supported or helped to support a family.

In this class of cases it is always competent to prove the extent of the disability resulting from the injury and the ability to labor or carry on business or pursue some avocation, both before and after the injury are proper matters for consideration to determine what would be adequate compensation.

We are of the opinion that the instruction complained of could not have misled the jury. Nor do we think reversible error was committed by the Court in its rulings on the admissibility of the evidence. In fact, the Court ruled out the evidence of appellee concerning her business of keeping boarders which was clearly competent and the appellant had the benefit of its exclusion.

The Court properly excluded the testimony of appellee concerning her inability to hire her work done. The evidence which was admitted for the consideration of the jury was competent to show the extent of the injury and the jury, under the rulings and instructions of the Court must have so understood it. We find no serious error in the admissibility of the evidence or the instructions given, but we feel impressed that the damages allowed were excessive. It appears that the injuries sustained are not of a permanent character. The physician who treated



used to take in washing for other people, and I used to work,  
help clean up the house, and now I cannot do my own washing,  
and I ain't able to hire much work, and I have to let my work  
go, on account of my hand hurt." To this answer attorney for  
appellant objected, and moved to exclude it.

The Court said: "The jury will disregard that part of the  
witness's answer with reference to not being able to hire some-  
one to do her work. That part you will disregard entirely.  
Notion denied as to the balance."

There was no attempt by appellee <sup>to</sup> show that appellee had  
a family or that she supported or helped to support a family.  
In this class of cases it is always competent to prove the  
extent of the disability resulting from the injury and the abil-  
ity to labor or carry on business or pursue some avocation, both  
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to determine what would be adequate compensation.

We are of the opinion that the instruction complained of  
could not have misled the jury. Nor do we think reversible  
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its exclusion.

"The Court properly excluded the testimony of appellee con-  
cerning her inability to hire her work done. The evidence which  
was admitted for the consideration of the jury was competent to  
show the extent of the injury and the jury, under the rulings  
and instructions of the Court must have so understood it. We  
find no serious error in the inadmissibility of the evidence or  
the instructions given, but we feel impressed that the damages  
allowed were excessive. It appears that the injuries sustained  
are not of a permanent character. The physician was retained

appellee testified that she came to his office the day following the injury; that her wrist was swollen and she was complaining with pain; that her wrist was injured; that he put the wrist in splints and saw her two or three times afterwards; that she diagnosed it as a superosteal fracture; that she would ultimately recover; that the splints were removed <sup>after</sup> about four weeks; that there was no dislocation and no deformity; that in time she would have perfect use of her wrist.

The judgment is for one thousand five hundred dollars (\$1,500.00) and unless the appellee shall within fifteen days enter a remittitur of five hundred dollars (\$500.00) the judgment will be reversed and the cause remanded. Upon appellee entering such remittitur the judgment will be affirmed.

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Affirmed

(To be published in abstract only.)

appellee testified that she came to his office the day follow-

ing the injury; that her wrist was swollen and she was com-

plaining with pain; that her wrist was injured; that he put

the wrist in splints and saw her two or three times afterwards;

that she diagnosed it as a suppurated fracture; that she would

ultimately recover; that the splints were removed <sup>after</sup> about four

weeks; that there was no dislocation and no deformity; that in

time she would have perfect use of her wrist.

The judgment is for one thousand five hundred dollars

(\$1,500.00) and unless the appellee shall within fifteen days

enter a remittitur of five hundred dollars (\$500.00) the judg-

ment will be reversed and the cause remanded. Upon appellee ent-

ering such remittitur the judgment will be affirmed.

RECEIVED

(To be published in abstract only.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 9th day of October, A. D. 1913.

*A. C. Millspaugh*

Clerk of the Appellate Court.

# OPINION

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12-8

376

# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon on the Fourth Tuesday in the month of March in the year of our LORD, one thousand nine hundred and thirteen, the same being the 25th day of March, in the year of our LORD, one thousand nine hundred and thirteen.

Present:

Hon. JAMES C. McBRIDE, Presiding Justice.

Hon. OWEN P. THOMPSON, Justice.

Hon. HARRY HIGBEE, Justice.

A. C. MILLSAUGH, Clerk.

W. S. PAYNE, Sheriff.

And afterwards in Vacation, after said March Term, to-wit: On the 9th — day of October, A. D. 1913, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

183 I.A. 617

**ERROR TO  
APPEAL FROM**

Vyskočil

vs.

No.

29

March Term, 1913.

Circuit COURT

Madison COUNTY

Edwardsville Home  
Traders.

TRIAL JUDGE

Hon.

M. E. Hadley



Term No. 29.

Agenda No. 41.

March Term, A. D. 1913.

John Vyskocil,  
Appellee,  
vs.  
Edwardsville Home Trade  
Coal Company,  
Appellant.)

Appeal from the  
Circuit Court of  
Madison County.

183 I.A. 617

Opinion by Thompson, J.

This suit is brought to recover damages resulting from a personal injury alleged to have been sustained by appellee and caused by the wilful negligence of appellant in its alleged failure to comply with the statute, in that, it failed to provide a certificated mine examiner at its mine who on the date of said injury, or within twelve hours preceding said injury, visited said mine and inspected the entry and inscribed on the walls of said entry the month and day of his visit. The declaration alleges further that the mine examiner did not at said time place a conspicuous mark or sign as notice to all men to keep out at a point on said entry near the face of said entry where a large amount of rock, slate, clod and other substances composing said roof were then and there loose and liable to fall, the existence of which dangerous condition was then and there known to the defendant through its said mine examiner, and that said mine examiner did not then and there take into his possession the entrance check of plaintiff and give the same to the mine manager before plaintiff entered said mine to work on the morning of said date. The declaration further alleges that the roof at said point was loose and liable to fall, and that by reason of the wilful violation of the statute in that regard, the plaintiff was permitted to enter said mine, and while working in his working place in said entry digging a hole in the floor of said entry to set a cross-bar, a large piece of rock, slate, clod

March Term, A. D. 1913.

Appeal from the  
Circuit Court of  
Madison County.

1831 A. 617

John Thompson, )  
Appellee, )  
vs. )  
Edwardsville Home Trade )  
Coal Company, )  
Appellant.

Opinion by Thompson, J.

This suit is brought to recover damages resulting from a personal injury alleged to have been sustained by appellee and caused by the willful negligence of appellant in its alleged failure to comply with the statute, in that, it failed to provide a certificated mine examiner at its mine who on the date of said injury, or within twelve months preceding said injury, visited said mine and inspected the entry and inscribed on the walls of said entry the month and day of his visit. The declaration alleges further that the mine examiner did not at said time place a conspicuous mark or sign as notice to all men to keep out at a point on said entry near the face of said entry where a large amount of rock, slate, and other substances composing said roof were then and there loose and liable to fall, the existence of which dangerous condition was the- and there known to the defendant through its said mine examiner, and that said mine examiner did not then and there take into his possession the entrance check of plaintiff and give the same to the mine manager before plaintiff entered said mine to work on the morning of said date. The declaration further alleges that the roof at said point was loose and liable to fall, and that by reason of the willful violation of the statute in that regard, the plaintiff was permitted to enter said mine, and while working in his working place in said entry digging a hole in the floor of said entry to set a cross-bar, a large piece of rock, slate, and

and other substance composing the said roof fell upon and injured plaintiff, etc.

There is but little controversy over the facts which are quite brief. The plaintiff was a miner employed in defendant's mine and received the injuries complained of on the morning of February 13. On the evening before, plaintiff had fired three shots in the face of the entry where he was working. Two of the shots were properly effective in throwing the coal from the face. The other shot did not throw the coal from the face, but left it standing loose at the face. On the morning of the accident, plaintiff replaced the timbers where the props had been blown out by the explosion of the shots. He then loaded two and one-half ( $2\frac{1}{2}$ ) boxes with loose coal thrown down by the shots on the gob side of the room and then proceeded to cut a "hitch hole" in the rib of the entry in order to place a bar under the piece which shortly after fell and injured him. The distance from the crossbar to the face of the coal was about six feet. Plaintiff worked alone in this entry. He is a miner of about ten years' experience.

It appears from the testimony of the mine examiner that on the morning of the accident and before plaintiff commenced work, he went into this entry and made an examination of the roof, using an iron rod for that purpose, and found that the entry sounded solid and that the roof was well timbered, that as a result of his examination he reported the entry as safe. It appears from the plaintiff's testimony that the figures 2-13 written with chalk were on the right hand side of the entry when he entered that morning. These figures are understood by miners to mean February 13. That there were no marks on the piece that fell. That there was nothing to indicate that a fall was likely to occur. That he was in the act of cutting a "hitch hole" in the right rib close to the face of the coal wherein he intended to place the right hand end of the cross-bar when the slate from



and other substance composing the said roof fell upon and in-

jured plaintiff, etc.

There is but little controversy over the facts which are quite brief. The plaintiff was a miner employed in defendant's mine and received the injuries complained of on the morning of February 12. On the evening before, plaintiff had fired three shots in the face of the entry where he was working. Two of

the shots were apparently effective in throwing the coal from the face. The other shot did not throw the coal from the face, but left it standing loose at the face. On the morning of the accident, plaintiff replaced the timbers where the props had been blown out by the explosion of the shots. He then loaded two and one-half (2½) boxes with loose coal thrown down by the shots on the gap side of the room and then proceeded to cut a "hitch hole" in the rib of the entry in order to place a bar under the piece which shortly after fell and injured him. He dis-

tance from the crossbar to the face of the coal was about six feet. Plaintiff worked alone in this entry. He is a miner of about ten years' experience. It appears from the testimony of the mine examiner that on the morning of the accident and before plaintiff commenced work, he went into this entry and made an examination of the roof, using an iron rod for that purpose, and found that the entry sound ed solid and that the roof was well timbered, that as a result of his examination he reported the entry as safe. It appears from the plaintiff's testimony that the figures 2, 12 written with chalk were on the right hand side of the entry when he entered that morning. These figures are understood by miners to mean February 12. That there were no marks on the piece that fell. That there was nothing to indicate that a fall was likely to occur. That he was in the act of cutting a "hitch hole" in the right rib close to the face of the coal wherein he intended to place the right hand end of the cross-bar when the slate from

the roof on the right hand side fell and injured him. The evidence does not show that the slate which fell on plaintiff was loose when the mine examiner was there that morning. Appellant's evidence does not show the roof appeared dangerous at that time. Defendant's mine manager testified that he visited the entry on that morning a short time before the accident and inspected the roof next to the face and told plaintiff not to mine any coal off the standing shot until he had set another cross-bar. The mine manager testified that after the accident he again visited the place and saw that coal had been mined off the standing shot. This testimony, however, was denied by plaintiff.

In order to successfully maintain this suit, plaintiff is required to show a wilful violation of the statute. The only attempt to do so this lies in the challenge made as to the truthfulness of the report and testimony of the mine examiner. He is the only witness who speaks about the conditions of the roof on the morning before plaintiff commenced work. The evidence relied on by plaintiff to uphold the verdict and judgment rest upon the circumstance that slate from the roof fell within a couple of hours after plaintiff began work.

There is no controversy in this case about the law. And the only dispute about the facts arises from the divergent views of counsel as to what the weight of the evidence shows to have been the condition of the roof when examined that morning by the mine examiner. Did a dangerous condition exist? We are unable from a close inspection of this record to find any preponderance of the evidence showing such dangerous condition as would justify holding defendant liable for wilful negligence.

The judgment under the evidence disclosed by this record cannot be sustained and is therefore reversed.

The court finds as a fact which is made a part of this judgment; that there was no dangerous condition of roof when the mine examiner examined it on the morning of the accident.

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(To be published in abstract only.)

the roof on the right had side fell and injured him. The evidence does not show that the slate which fell on plaintiff was loose when the mine examiner was there that morning. Appellant's evidence does not show the roof appeared dangerous at that time. Defendant's mine manager testified that he visited the entry on that morning a short time before the accident and inspected the roof next to the face and told plaintiff not to mine any coal at the standing shot until he had set another cross-bar. The mine manager testified that after the accident he again visited the place and saw that coal had been mined off the standing shot. This testimony, however, was denied by plaintiff.

In order to successfully maintain this suit, plaintiff is required to show a willful violation of the statute. The only attempt to do so in this case is the challenge made as to the truthfulness of the report and testimony of the mine examiner. He is the only witness who speaks about the conditions of the roof on the morning before plaintiff commenced work. The evidence relied on by plaintiff to uphold the verdict and judgment rest upon the circumstance that slate from the roof fell within a couple of hours after plaintiff began work.

There is no controversy in this case about the law. And the only dispute about the facts arises from the divergent views of counsel as to what the weight of the evidence shows to have been the condition of the roof when examined that morning by the mine examiner. Did a dangerous condition exist? We are unable from a close inspection of this record to find any preponderance of the evidence showing such dangerous condition as would justify holding defendant liable for willful negligence.

The judgment under the evidence disclosed by this record cannot be sustained and is therefore reversed. The court finds as a fact which is made a part of this judgment that there was no dangerous condition of roof over the mine at the time it was examined on the morning of the accident. (The evidence is believed to be correct.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 9th day of October, A. D. 1913.

A. C. Millspaugh  
Clerk of the Appellate Court.

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# OPINION

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Vol. 1

No. 1

Free S.

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Receiving Record Oct 23, 1912

held at Mt. Vernon on the Fourth Tuesday in the  
and nine hundred and thirteen, the same being  
thousand nine hundred and thirteen.

Justice.

W. S. PAYNE, Sheriff.

W. S. PAYNE, Sheriff.

183 I.A. 618

Grossinger

31

vs.

City

**COURT**

E. H. Larrin

~~COUNTY~~

Metropolitan Life  
Ins. Co

TRIAL JUDGE

*Hon*

H. M. Vandeventer



March Term, A. D. 1913.

Josef Groffinger.

Appellée.

V 83.

The Metropolitan Life Insurance Company.

Appellant.

Appeal from the  
City Court of  
East St. Louis.

183 I.A. 618

Opinion by Thomson, J.

This is an action of assumpsit brought by appellee against appellant on a life insurance policy. A Trial by jury resulted in a verdict for \$620.00 in favor of appellee.

Two policies were issued by appellant on the life of Erzsébet Groffinger in each of which appellee was named as beneficiary. Appellee was the father of Erzsébet. He was about thirty-nine years old and his said daughter was sixteen years old. Appellee is a shoemaker who came to this country from Austria-Hungary. He had a limited knowledge of the English language. Appellant also issued insurance on the lives of the three other children of appellee. The ages of the other children were thirteen, ten and seven years. Appellee paid the premiums on all the policies issued to his children.

The first of the two policies was issued to this girl July 8, 1912, the application for which was dated June 28, 1912, and the amount of policy ~~##~~ \$240.00. The second policy was dated August 23, 1912, and the application August 12, 1912. The semi-annual premium on the second policy was \$10.75, payable in advance. The insured died September 8, 1912.

Appellant does not deny issuance of policies as claimed by Appellee, but sets up as defence to the action on the policy that the insured made untrue answers to questions appearing in her application for insurance. The appellant wrote five policies on the lives of appellee's children. Two on the life of Erzsebet

March Term, A. D. 1913.

Appeal from the  
City Court of  
East St. Louis.

1831 A. 618

Appellant.  
The Metropolitan Life  
Insurance Company  
vs.  
Appellee.  
Jesse Grottinger

Opinion by Thompson, J.

This is an action of assumpsit brought by appellee against appellant on a life insurance policy. A trial by jury resulted in a verdict for \$250.00 in favor of appellee.

Two policies were issued by appellant on the life of Jesse Grottinger in each of which appellee was named as beneficiary. Appellee was the father of Grottinger. He was about thirty-nine years old and his said daughter was sixteen years old. Appellee is a shoemaker who came to this country from Austria-Hungary. He had a limited knowledge of the English language. Appellant also issued insurance on the lives of the three other children of appellee. The ages of the other children were thirteen, ten and seven years. Appellee paid the premiums on all the policies issued to his children.

The first of the two policies was issued to this girl July 8, 1912, the application for which was dated June 28, 1912, and the amount of policy \$240.00. The second policy was dated August 23, 1912, and the application August 12, 1912. The annual premium on the second policy was \$10.75, payable in advance. The insured died September 8, 1912.

Appellant does not deny issuance of policies as claimed by appellee, but sets up as defence to the action on the policy that the insured made untrue answers to questions appearing in her application for insurance. The appellant wrote five policies on the lives of appellee's children. Two on the life of Grottinger

and one on each of the three younger children. Erzsebet, a Hungarian girl, was about sixteen years old and unable to speak or understand the English language. The application was in the English language. The answers to all the questions were written by the agent of appellant. This agent could and did talk to the girl in her native tongue, according to the testimony of her father and her sister Rosie, who were present when the application was filled out. The girl indicated to the agent that she suffered with pains over the heart, and the agent then said, "That is all right; she will get well again."

The plan of the insurance under the first policy issued to Erzsebet did not require a medical examination, but the company's physician, Dr. Ralph B. Scott, on June 29, 1912, furnished the company a certificate in which he stated among other things that he had personally seen Erzsebet sign the application and that at that time she was in good health and her constitution was sound and that the application was made in good faith.

The plan of insurance as to the second policy on said life did require a medical examination, and the same physician on August 12, 1912, reported that, "her general appearance was healthy; that the respiratory murmur was clear and distinct over both lungs; that the respiration was full, easy and regular; that there was no indication of diseased respiratory organs; that the character of the heart's action was uniform, free and steady; its sound and rhythm were sound and normal, etc.", and he recommended the proposed life for insurance as being in good health with good constitution and acceptable at first class rates.

The applications signed by Erzsebet each contained a negative answer to the question whether she had been under treatment in any dispensary, hospital or asylum. And in answer to the question what physician had attended her and the date of such attendance, the signed answer was, "none since infancy." If these answers were untrue ( and it seems they were measurably



and one on each of the three younger children. Trusebet, a Hungarian girl, was about sixteen years old and unable to speak or understand the English language. The application was in the English language. The answers to all the questions were written by the agent of appellant. This agent could and did talk to the girl in her native tongue, according to the testimony of her father and her sister Rosie, who were present when the application was filled out. The girl indicated to the agent that she suffered with pains over the heart, and the agent then said, "That is all right; she will get well again."

The plan of the insurance under the first policy issued to Trusebet did not require a medical examination, but the company's physician, Dr. Ralph B. Scott, on June 29, 1912, furnished the company a certificate in which he stated that at that time she was in good health and her constitution was sound and that the application was made in good faith.

The plan of insurance as to the second policy on said life did require a medical examination, and the same physician on August 12, 1912, reported that "her general appearance was healthy; that the respiratory murmur was clear and distinct over both lungs; that the respiratory system was full, easy and comfortable; that there was no indication of diseased respiratory organs; that the character of the heart's action was uniform, free and steady; its sound and rhythm were sound and normal, etc.", and he recommended the proposed life for insurance as being in good health with

good constitution and susceptible of long life. The applications signed by Trusebet each contained a negative answer to the question whether she had been under treatment in any dispensary, hospital or asylum. And in answer to the question what physician had attended her and the date of such attendance, the signed answer was, "none since infancy." It is these answers were untrue (and it seems they were measurably

so) and the truth was withheld for the purpose of deceiving the company in order to obtain insurance, such conduct would be sufficient to vitiate the policy.

In applications for insurance the contract may be in the nature of a warranty of the truth of the matters stated concerning the applicant's past or present condition of health, or the language employed may be only of the character of representations. The contracts of insurance in this case brings it within the latter class. And in order for the company to defeat a recovery the evidence must show that the representations were material, were false, and known to be false by the insured and were made to deceive the company. These are questions of fact. They are to be determined by the jury. They were submitted to a jury in this case, and unless it appears that the findings of the jury were unwarranted by the evidence, their findings should be upheld.

We fail to discover that the insured was seeking to perpetrate any fraud on the company. She was only sixteen years of age, was unfamiliar with the English language. She indicated to the agent that she had trouble with her heart, and he waved her act aside, saying, "She will get well soon." The agent wrote each answer for her. All she did was to sign the statement. There is nothing in the record that goes to show that she was trying to misrepresent her physical condition.

It is contended by appellant that the insured made untrue answers in her application and that they were so material as to render the policy issued thereon void ab initio. On assuming such a position the law requires that all premiums paid the company shall be returned, on the ground that at no time has the company assumed any risk. A failure to return, or offer to return the premiums in such cases is a ratification of the contract of insurance, and renders the company liable. *McCurrey vs. Metropolitan Life Insurance Co.* 168 Appellate 625.

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 the company in order to obtain insurance, such conduct would  
 be sufficient to vitiate the policy.  
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 in this case, and unless it appears that the findings of the ju-  
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 age, was unfamiliar with the English language. She indicated to  
 the agent that she had trouble with her heart, and he waved her  
 off aside, saying, "She will get well soon." The agent wrote  
 each answer for her. All she did was to sign the statement.  
 There is nothing in the record that goes to show that she was  
 trying to misrepresent her physical condition.  
 It is contended by appellant that the insured made untrue  
 answers in her application and that they were so material as to  
 render the policy issued thereon void ab initio. On assuming  
 such a position the law requires that all premiums paid the com-  
 pany shall be returned, on the ground that at no time has the  
 company assumed any risk. A failure to return premiums is to  
 turn the premiums in such cases is a ratification of the contract  
 of insurance, and renders the company liable. *Century v. West*.  
 Appellant Life Insurance Co. 100 Appellate 415.

All premiums were fully paid. There was no offer by the company to return the premiums or any part of them.

Under all the facts and circumstances appearing in this case we cannot hold that the judgment was unwarranted, and it will be affirmed. Judgment affirmed.

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(To be published in abstract only.)

... premiums were fully paid. There was no offer by the  
... to return the premiums or any part of them.  
Under all the facts and circumstances mentioned in this  
case we cannot hold that the judgment was unwarranted, and it  
will be affirmed. Judgment affirmed.

(To be completed in abstract only.)



I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 9th day of October, A. D. 1913.

A. C. Millspaugh  
Clerk of the Appellate Court.

# OPINION

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# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon on the Fourth Tuesday in the month of March in the year of our LORD, one thousand nine hundred and thirteen, the same being the 25th day of March, in the year of our LORD, one thousand nine hundred and thirteen.

Present:

Hon. JAMES C. McBRIDE, Presiding Justice.

Hon. OWEN P. THOMPSON, Justice.

Hon. HARRY HIGBEE, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff.

And afterwards in Vacation, after said March Term, to-wit: On the 9th day of October, A. D. 1913, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Brookport  
Nat Bank

No. 35 vs.

March Term, 1913.

Smith

183 I.A. 623

~~ERROR TO~~  
APPEAL FROM

Circuit COURT

Massac COUNTY

TRIAL JUDGE

Hon. A. W. Lewis



Term No. 36.

Agenda No. 11.

March Term, A. D. 1913.

Brookport National Bank,

vs.

A. B. Smith,

Appellant,

Appellee.)

Appeal from the  
Circuit Court of  
Massac County.

183 I.A. 623

Opinion by Thompson, J.

Appellee was surety on a note made by O.H. Margrave, to appellant. At the time of the execution of the note, and as a part of the note contract, a written agreement was entered into between appellant and appellee, which is here set out in full:

"Paducah, Ky., 8-28-'11.

In consideration of the A. B. Smith Lumber Co. signing as security with O. H. Margrave note dated August 28, 1911, due six months after date for the amount of \$486.66 we agree to withdraw suit which we have entered against A. B. Smith Lumber Co., for a note dated November 7, 1910, due March 1, 1911, for the amount of \$486.66 this note having been made in favor of O. H. Margrave and signed A. B. Smith Lumber Co. We further agree that in case this note has not been paid off at the expiration of six months, we will extend an additional six months' time with interest at the rate of 7 o/o per annum with the understanding that A.B. Smith Lumber Co. endorse this renewal note as security. It is the understanding that this note is to be paid from a part of the saw bill which O. H. Margrave does for A. B. Smith Lumber Co., during this period of time, and while we have an agreement from O. H. Margrave that he is to apply a certain part of his saw bills on his indebtedness with us, we agree that during this period of time to withdraw our demands of O.H. Margrave paying on other indebtedness other than this particular note, and we agree not to interfere with O. H. Margrave in manufacturing these logs for A.B.



March Term, A. D. 1913.

Appeal from the  
Circuit Court of  
Massachusetts.

Brookport National Bank,  
Appellant,  
vs.  
A. B. Smith Lumber Co.,  
Appellee.

1831.A.628

Opinion by Thompson, J.

Appellee was surety on a note made by O. H. Margrave, to appellant. At the time of the execution of the note, and as a part of the note contract, a written agreement was entered into between appellant and appellee, which is here set out in full:

"Whereas, by the following agreement, to-wit:

In consideration of the A. B. Smith Lumber Co. signing as security with O. H. Margrave note dated August 28, 1911, due six months after date for the amount of \$486.66 we agree to withdraw suit which we have entered against A. B. Smith Lumber Co., for a note dated November 7, 1910, due March 1, 1911, for the amount of \$486.66 this note having been made in favor of O. H. Margrave and signed A. B. Smith Lumber Co. We further agree that in case this note has not been paid off at the expiration of six months, we will extend an additional six months' time with interest at the rate of 7% per annum with the understanding that A. B. Smith Lumber Co. endorse this renewal note as security. It is the understanding that this note is to be paid from a part of the saw bill which O. H. Margrave does for A. B. Smith Lumber Co., during this period of time, and while we have an agreement from O. H. Margrave that he is to apply a certain part of his saw bill on his indebtedness also on, we agree that during this period of time to withdraw our demands of O. H. Margrave paying on other indebtedness other than this particular note, and we agree not to interfere with O. H. Margrave in manufacturing these logs for A. B.

Smith Lumber Co. during the period of twelve months.

We further agree that in event O. H. Margrave's mill should be destroyed by fire during this period of twelve months we will not hold A. B. Smith Lumber Co., liable or responsible for such of this note that may not have been paid with the understanding that the A. B. Smith Lumber Co., cause an additional amount of insurance of \$500 to be placed on this mill over the amount which is now carried. We further agree that if during this period of twelve months time we or O. H. Margrave sell this mill, which of course, would prevent the manufacturing of these logs for the A. B. Smith Lumber Co., we will not hold A. B. Smith Lumber Co., responsible or liable for the payment of any part or balance due on this note.

BROOKPORT NATIONAL BANK,  
H. W. Holifield, Pres."

The rights of the parties in this case depend upon the construction to be given to this contract.

It is clearly evident that the parties intended that whatever amount Margrave earned by sawing lumber for appellee, should be applied on the note. Both parties understood the contract to mean that.

Appellee was to allow Margrave one dollar per thousand for sawing lumber and was to pay the amount so earned by Margrave to the appellant bank, to be credited on the Margrave and Smith note. This arrangement was acted on for six months. A credit was entered on the note for the amount earned by sawing, and there was a balance due on said note of \$272.18, for which a new note was given by Margrave and appellee. This is the note sued on in this case.

There were no payments made by Margrave or Smith on this note, unless as contended by appellee, that moneys earned during the first six months after the signing of the original note by Margrave, by his sawing lumber for other parties, and paid to

Smith Lumber Co. during the period of twelve months.

We further agree that in event G. H. Kargrave's mill should

be destroyed by fire during this period of twelve months we will

not hold A. B. Smith Lumber Co., liable or responsible for such

of this note that may not have been paid with the understanding

that the A. B. Smith Lumber Co., cause an additional amount of

insurance of \$500 to be placed on this mill over the amount which

is now carried. We further agree that during this period of

twelve months time we or G. H. Kargrave sell this mill, which of

course, would prevent the manufacturing of these logs for the A.

B. Smith Lumber Co., we will not hold A. B. Smith Lumber Co., re-

sponsible or liable for the payment of any part or balance due

on this note.

BROOKLYN NATIONAL BANK  
N. W. Hollifield, Treas.

The rights of the parties in this case depend upon the con-

struction to be given to this contract.

It is clearly evident that the parties intended that what-

ever amount Kargrave earned by sawing lumber for Applebee should

be applied on the note. Both parties understood the contract to

mean that.

Applebee was an active partner and was to be credited with

sawing lumber and was to pay the amount so earned by Kargrave to

the appellant bank, to be credited on the Kargrave and Smith

note. This arrangement was acted on for six months. A credit

was entered on the note for the amount earned by sawing, and there

was a balance due on said note of \$279.18, for which a new note

was given by Kargrave and Applebee. This is the note sued on in

this case.

There were no payments made by Kargrave or Smith on this

note, unless as contended by Applebee, that moneys earned during

the first six months after the signing of the original note by

Kargrave, for sawing lumber for other parties, and paid to

the bank, should have been credited on the Margrave note for which appellee was security.

Margrave owed appellant bank, and the bank had an arrangement with him by which there should be paid to it one dollar per thousand, from the earnings of all lumber he sawed.

It appears Margrave did saw lumber for other people during said six months, and did pay appellant money to the amount of Two Hundred Forty Five Dollars and Eighty Eight Cents (\$245.88), out of such earnings, and the bank applied the same on other indebtedness.

Had the bank the right to receive and apply the funds so paid by Margrave, to other indebtedness or would the terms of the contract between appellee and appellant require said funds to be credited on the note for which appellee was standing as ~~as~~ security? This is the vital question in this case.

The relation of the parties to each other, the circumstances under which the note and contract were made, and the object sought to be accomplished should be considered in order to arrive at a fair and proper construction of the contract.

At the time the note and contract were executed, appellee and Margrave had been sued by appellant bank on their note dated November 7, Nineteen Hundred and Ten, due March 1, Nineteen Hundred and Eleven.

An agreement was then made between appellant and appellee by which the suit was not to be prosecuted. Appellant was to accept the new note for said sum. Margrave was to sign the note as principal, and appellee as security.

This was done. Had nothing further been done, the right of the parties would have been clearly fixed by the rules of law. The bank could have looked to both appellee and Margrave for unconditional payment when the note fell due. But the contract referred to was made for some purpose. It was evidently the pur-

the bank, should have been credited on the Mortgage note for which appellant was security.

Mortgage owed appellant bank, and the bank had an arrangement with him by which there should be paid to it one dollar per thousand, from the earnings of all lumber he sawed.

It appears Mortgage did saw lumber for other people during said six months, and did pay appellant money to the amount of Two Hundred Forty Five Dollars and Eighty Eight Cents (\$245.88), out of such earnings, and the bank applied the same on other indebtedness.

Had the bank the right to receive and apply the funds so paid by Mortgage, to other indebtedness or would the terms of the contract between appellee and appellant require said funds to be credited on the note for which appellee was standing as security? This is the vital question in this case.

The relation of the parties to each other, the circumstances under which the note and contract were made, and the object sought to be accomplished should be considered in order to arrive at a fair and proper construction of the contract.

At the time the note and contract were executed, appellee and Mortgage had been sued by appellant bank on their note dated November 7, Nineteen Hundred and Ten, for which it is stated that they were sued and eleven.

An agreement was then made between appellant and appellee by which the suit was not to be prosecuted. Appellant was to accept the new note for said sum. Mortgage was to sign the note as principal, and appellee as security.

This was done. Had nothing further been done, the right of the parties would have been clearly fixed by the rules of law. The bank could have insisted its rights against Mortgage for the conditional payment when the note fell due. But the contract of

letting it see and use the same sum, it was certainly the



pose to benefit either the bank or appellee. Who was to be helped or accommodated by the contract? Certainly not the bank. It could have collected its debt from appellee had it prosecuted the suit to judgment instead of dismissing it. Appellee was naturally desirous that Margrave, the principal, should pay this debt, and the bank evidently wanted to assist him in that regard. And so it came about that the contract was made, which had this provision in it:

"It is the understanding that this note is to be paid from a part of the saw bill which O. H. Margrave does for the A. B. Smith Lumber Co. during this period of time; and, while we have an agreement from O. H. Margrave that he is to apply a certain part of all his saw bills on his indebtedness with us, we agree, that during this period of time, to withdraw our demands of O. H. Margrave paying on other indebtedness other than this particular note; and we agree not to interfere with O. H. Margrave in manufacturing these logs for A. B. Smith Lumber Co. during the period of twelve months."

Appellee had logs he wanted sawed. Appellant had prior to the making of this contract, an arrangement with Margrave that the bank should have one dollar per thousand feet for all lumber Margrave would saw, to be applied on the Margrave indebtedness to the bank.

A reasonable conclusion to be drawn from the language used in the contract under the circumstances, inclines us to believe that appellant was willing to waive the claim of one dollar per thousand, against Margrave, as to all lumber he sawed from logs furnished by appellee. This apparently was done to accommodate appellee, who was not the principal debtor.

No reason is urged, nor does any appear, why the bank would waive its claim as to the earnings of Margrave from sawing done for other people. It was only as to work furnished by appellee that the waiver did apply, unless the contract clearly shows a

these to benefit either the bank or appellee. The way to be  
 helped or accommodated by the contract? Certainly not the bank.  
 It could have collected its debt from appellee had it prosecuted  
 the suit to judgment instead of dismissing it. Appellee was  
 naturally desirous that Margrave, the principal, should pay this  
 debt, and the bank evidently wanted to assist him in that regard.  
 and so it came about that the contract was made, which was  
 provision in it:

"It is the understanding that this note is to be paid from a  
 part of the saw bill which O. H. Margrave does for the A. B.  
 Smith Lumber Co. during this period of time; and, while we have  
 an agreement with O. H. Margrave that he is to pay a certain  
 part of all his saw bills on his indebtedness with us, we agree,  
 that during this period of time, to withdraw our demands of O. H.  
 Margrave paying on other indebtedness other than this particular  
 note; and we agree not to interfere with O. H. Margrave in man-  
 aging his saw bill for A. B. Smith Lumber Co. during the period  
 of twelve months."

Appellee had logs he wanted sawed. Appellant had prior to  
 the making of this contract, an agreement with Margrave that  
 the bank should have one dollar per thousand for all lumber  
 Margrave would saw, to be applied on the Margrave indebtedness  
 to the bank.

A reasonable conclusion to be drawn from the language used  
 in the contract under the circumstances, inclines us to believe  
 that appellant was willing to waive the claim of one dollar per  
 thousand, against Margrave, as to all lumber he sawed from logs  
 furnished by appellee. This apparently was done to accommodate  
 appellee, who was not the principal debtor.

The reason is stated, not does not appear, why the bank would  
 waive its claim as to the earnings of Margrave from sawing done  
 for other parties. It was only an act of forbearance by appellee  
 that the matter did arise, unless the contract clearly shows a

different intention, and it does not so show.

The court erred in holding that the contract gave appellee the right to have his note credited with the sawyer's earnings for work done for other people, and applied by the bank on other indebtedness than appellee's.

For the reasons indicated, this case is reversed and remanded.

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(To be published in abstract only.)

different intention, and it does not so mean.

The court rules in holding that the contract was completed

the time the party gave his note completed with the party's intention

for work done for some service, and entitled to the work done.

or indebtedness, then appellee.

For the reasons indicated, this case is reversed and re-

manded.

REVEREND

REVEREND

(To be published in current only.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 9th day of October, A. D. 1913.

A. C. Millspaugh  
Clerk of the Appellate Court.



# OPINION

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# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon on the Fourth Tuesday in the month of March in the year of our LORD, one thousand nine hundred and thirteen, the same being the 25th day of March, in the year of our LORD, one thousand nine hundred and thirteen.

Present:

Hon. JAMES C. McBRIDE, Presiding Justice.

Hon. OWEN P. THOMPSON, Justice.

Hon. HARRY HIGBEE, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff.

And afterwards in Vacation, after said March Term, to-wit: On the 9th day of October, A. D. 1913, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

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183 I.A. 624

~~ERROR TO~~  
APPEAL FROM

No. 46 vs.

March Term, 1913.

City COURT

Edwards COUNTY

Manuel

TRIAL JUDGE  
Hon. M. M. Vandewater



March Term, A. D. 1913.

|                |   |            |
|----------------|---|------------|
| P. B. Cheaney, | ) |            |
| vs.            | ) | Appellee,  |
| L. A. Manewal, | ) | Appellant. |
|                | ) |            |

Appeal from the  
City Court of  
East St. Louis.

183 I.A. 624

Opinion by Thompson, J.

This is a suit by appellee, who is an attorney at law, to recover for legal services rendered appellant in connection with the purchase by appellant of the Peerless Bread Company Bakery, located in East St. Louis.

Appellee learned that the Peerless Bread Company was in financial straits and on May 28, 1912, called the attention of appellant to its condition and suggested that there was an opportunity to buy it at a bargain. Appellant was a wholesale baker in St. Louis, Missouri.

The following day appellant and appellee went together to East St. Louis to investigate the matter, with a view to its purchase by appellant. There is no controversy about appellee being engaged to render services to appellant in that behalf. The dispute arises as to the kind of contract that was made. Appellant claims appellee was to have a commission of five hundred dollars if the purchase was made for five thousand dollars, while appellee claims that no stated amount was agreed on. That appellant told him he wanted his help and there would be something in it for him.

The evidence shows that appellee was engaged almost constantly from May 28 to June 26 in investigating the matter of title, negotiating with the trustee in charge of the property and arranging with creditors of the Peerless Bread Company and attending to a large number of details in and about the business in or-

March Term, A. D. 1913.

Appeal from the  
City Court of  
East St. Louis.

T. B. Chesney,  
 Appellee,  
 vs.  
 J. A. Chesney,  
 Appellant.

MSA. A. 1881

Opinion by Thompson. 1.

This is a suit by appellee, who is an attorney at law, to recover for legal services rendered appellant in connection with the defense of appellant of the Yearling Horse Company, Robert, located in West St. Louis.

baker in St. Louis Missouri.

The following day appellant and appellee went together to

with regard to candy business is reported to have been  
purchased by applicant. There is no controversy about applicant  
last St. Louis to investigate the matter, with a view to the

1. The dispute arises as to the kind of contract that was made. Appellant claims appellee was to have a commission of five hundred dollars if the purchase was made for five thousand dollars; while appellee claims that no stated amount was agreed on. That appellant told him he wanted his help and there would be something in

The witness knows that applicant was engaged about December 15, 1935, to June 28, 1936, in investigating the matter of this investigation with the Bureau in charge of the property and the handling with President of the Western Bank Company and others. He is a large number of details in connection with business in the



der to obtain for appellant, a safe purchase. A purchase was finally made that seems to have been quite satisfactory to appellant <sup>and</sup> which according to the evidence, was a very profitable and successful deal for appellant.

On a trial of this cause, the jury awarded appellee seven hundred and fifty dollars for his legal services, and the Court rendered judgment on the verdict. Appellant contends it is excessive.

The evidence of appellee showed that the services were reasonably worth the amount found by the jury. The witnesses introduced by appellant fix the value of appellee's services as from three hundred to five hundred dollars.

It is a question solely for the consideration of the jury, and from the record we find no reason to disturb the judgment on the jury's verdict. There are no errors in the record that would authorize a reversal of that judgment and the judgment will therefore be affirmed.

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(To be published in abstract only.)

der to obtain for appellant, a sale purchase. A purchase was  
finally made that seems to have been quite satisfactory to appen-  
dant <sup>and</sup> which according to the evidence, was a very profitable and  
successful deal for appellant.

On a trial of this cause, the jury awarded appellee seven  
hundred and fifty dollars for his legal services, and the Court  
rendered judgment on the verdict. Appellant contends it is ex-

The evidence of appellee showed that the services were reason-  
ably worth the amount found by the jury. The witnesses in-  
duced by appellant fix the value of appellee's services at  
from three hundred to five hundred dollars.

It is a question solely for the consideration of the jury,  
and from the record we find no reason to disturb the judgment  
on the jury's verdict. There are no errors in the record that  
would authorize as a reversal of that judgment and the judgment  
will therefore be affirmed.

(To be published in abstract only.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 9th day of October, A. D. 1913.

*A. C. Millspough*

Clerk of the Appellate Court.

# OPINION

Fee \$...

...

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# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon on the Fourth Tuesday in the month of March in the year of our LORD, one thousand nine hundred and thirteen, the same being the 25th day of March, in the year of our LORD, one thousand nine hundred and thirteen.

Present:

Hon. JAMES C. McBRIDE, Presiding Justice.

Hon. OWEN P. THOMPSON, Justice.

Hon. HARRY HIGBEE, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff.

And afterwards in Vacation, after said March Term, to-wit: On the 9th day of October, A. D. 1913, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

183 I.A. 625

Ballou

~~ERROR TO~~  
APPEAL FROM

vs.

No. 47

March Term, 1913.

City

COURT

Edwards

COUNTY

Woodmen's Casualty Co

TRIAL JUDGE

Hon. R. H. Hannigan





Agenda No. 32.

Thomas Ballance.

Appellee.

v8.

Woodmen's Casualty  
Company.

Appellant.)

Appeal from the  
City Court of  
East St. Louis.

183 I.A. 625

This is a suit by appellee on an accident insurance policy issued to him by appellant. Appellee claims he was accidentally injured on November 7, 1909. That the injuries so sustained resulted in his total disability.

This plea was directed to a clause of the insurance policy, which was copied in full in the plea as follows:

"At the rate of thirty-five dollars per month, while under the care of and attended by a legally qualified physician or surgeon, not exceeding twenty-four consecutive months, should the insured receive bodily injury, while this policy is in full force and not hereinafter excepted, provided such temporary total disability shall be caused solely and exclusively by bodily injuries which are the direct and proximate result of, and are caused solely and exclusively by external, violent, accidental, and

March Term, A. D. 1913.

Appeal from the  
City Court of  
East St. Louis.

Thomas Ballance,  
Appellee,  
vs.  
Woodman's Laundry  
Company,  
Appellant.

1881 A. 625

Opinion by Thompson, J.

This is a suit by appellee on an accident insurance policy issued to him by appellant. Appellee claims he was accidentally injured on November 7, 1909. That the injuries so sustained resulted in his total disability.

The declaration charges that appellee, "happened to an accident while walking on the sidewalk in Granite City, which so seriously injured him as to cause him to be unable to attend to any of his usual duties, and which necessitated his being under the care of a physician and surgeon from thence until now; and he is and has been totally disabled and under ~~total~~ total disability to perform any kind of labor and work." To this declaration appellant filed six special pleas, one of which avers that plaintiff "did not receive any injuries whatsoever, caused solely and exclusively by external, violent, accidental and involuntary means."

This plea was directed to a clause of the insurance policy, which was copied in full in the plea as follows:

"At the rate of thirty-five dollars per month, while under the care of and attended by a legally qualified physician or surgeon, not exceeding twenty-four consecutive months, should the insured receive bodily injury, while this policy is in full force and not hereinafter excepted, provided such temporary total disability shall be caused solely and exclusively by bodily injuries which are the direct and proximate result of, and are caused solely and exclusively by external, violent, accidental, and

involuntary means( pther than such as shall result fatally, or in the loss of one or both hands, or one or both feet, or one or both eyes), which shall at once continuously and wholly disable the insured from the date of accident and prevent the insured from performing any and every kind of work or business.

Issue was joined on this and the other pleas.

It appears from the evidence of appellee's witnesses, that he was discovered lying on the side-walk on the evening of November 7, <sup>1909</sup> ~~1900~~, and nearby a loose board was out of the side-walk. The board was about seven feet long, and ten or twelve inches wide. Witnesses for appellant testified there was no loose board or board out of the sidewalk near the place where appellee was found.

Appellee claims that he sustained injuries to his back. The doctor who was called to see him said he discovered no external evidences when he first saw him, but a day or two later there was some evidence of bruises. That he was suffering across the spine in the region of the pelvis bone, and in the region over the left kidney. He went about with the aid of crutches until sometime in July or August, 1910, when he went to Missouri to live.

The deposition of Doctor Van Grep, who treated appellee when he was in Missouri, was read in evidence, and from his testimony it appears that appellee is in a helpless condition with both lower limbs paralyzed, and with mind and reason gone. That such was his condition when he first saw him on August 24, 1910.

It appears that appellee was able to go about and was mentally all right when he left Granite City a few weeks before. The evidence also shows that appellee had brought a suit against the city of Granite City, to recover for the same injuries, and that he sought to hire witnesses to testify to the bad condition of the sidewalk, and had threatened to get even with the city be-

involuntary means (other than such as shall result fatally, or in the loss of one or both hands, or one or both feet, or one or both eyes), which shall at once continuously and wholly disable the insured from the date of accident and prevent the insured from performing any and every kind of work or business.

Issue was joined on this and the other pleas. It appears from the evidence of appellee's witnesses, that he was discovered lying on the sidewalk on the evening of November 7, 1908, and nearly a loose board was out of the sidewalk. The board was about seven feet long, and ten or twelve inches wide. Witnesses for appellant testified there was no loose board or board out of the sidewalk near the place where appellee was found.

Appellee claims that he sustained injuries to his back. The doctor who was called to see him said he discovered no external evidences when he first saw him, but a day or two later there was some evidence of bruises. That he was suffering across the spine in the region of the pelvis bone, and in the region over the left kidney. He went about with the aid of crutches until sometime in July or August, 1910, when he went to Missouri to live.

The deposition of Doctor Van Dusen, who testified appellee when he was in Missouri, was read in evidence, and from his testimony it appears that appellee is in a helpless condition with both lower limbs paralyzed, and with mind and reason gone. That such was his condition when he first saw him on August 24, 1910.

It appears that appellee was able to go about and was wholly all right when he left Granite City a few weeks before. The evidence also shows that appellee had brought a suit against the city of Granite City, to recover for the same injuries, and that he sought to hire witnesses to testify to the bad condition of the sidewalk, and had threatened to get even with the city by

cause he had been discharged from the police force on account of drunkenness. It also appears from the evidence that appellee had been suffering with his kidneys and back for some time previous to the date of the alleged injury.

Appellant insisted on the trial and insists here that he suffered no injury through the accident. That the evidence fails to show that the appellee suffered an accident causing the total disability or that such total disability was caused solely and exclusively by bodily injuries which were the direct and proximate results and caused solely and exclusively by external, violent, accidental and involuntary means.

Appellant urgently contends that under the state of the pleadings and evidence the court committed prejudicial error by giving appellee's instructions. The first instruction given by appellee is as follows:

"The Court instructs the jury that, if you find from the evidence in the case that the plaintiff has made out his case, as set forth and alleged in his declaration, by a preponderance of the evidence, then you should find for the plaintiff and against the defendant company, and assess plaintiff's damage at the sum of thirty-five dollars per month for each month the jury may find from the preponderance of the evidence the plaintiff was wholly and continuously disabled commencing with the month of November, and the seventh day, 1909, and continuing until the 28th day of December, 1910, together with five per cent interest until the 25th day of November, 1912."

This instruction in effect directs a verdict for the plaintiff if the facts referred to in the instruction are found in favor of the plaintiff. Such instruction should contain all the facts which would authorize a verdict for the plaintiff. *Pardridge vs. Cutler*, 168 Ill., 504.

By this instruction the jury are told they may refer to the



... it also appears from the evidence that appellee had been suffering with his kidneys and back for some time previous to the date of the alleged injury.

Appellant insisted on the trial and insists now that he suffered no injury through the accident. That the evidence fails to show that the appellee suffered no accident causing his total disability or that such total disability was caused solely and exclusively by bodily injuries which were the direct and proximate results and caused solely and exclusively by external, vicarious, accidental and involuntary means.

Appellant urgently contends that under the state of the findings and evidence the court committed prejudicial error by giving appellee's instructions. The first instruction given by the court is as follows:

"The Court instructs the jury that, if you find from the evidence in the case that the plaintiff has made out his case, you may find and award in his favor, by a preponderance of the evidence, that you should find for the plaintiff and award the defendant company, and answer that bill's demand for the sum of thirty-five dollars and costs for each month the jury may find from the circumstances of the evidence that the plaintiff was wholly and continuously disabled commencing with the month of

November, and the seventh day, 1909, and continuing until the 28th day of December, 1910, together with five per cent interest until the 15th day of November, 1912."

This instruction in effect directs a verdict for the plaintiff if all the facts referred to in the instruction are found in favor of the plaintiff. Such instruction should contain all the facts which would authorize a verdict for the plaintiff. This is the instruction the jury are told they may refer to the



declaration to determine the issues to be tried. The practice of giving such instructions while not alone, regarded as reversible error, has been repeatedly held not commendable. Baker <sup>and</sup> ~~vs.~~ Reddick vs. Summers, 201 Ill., 52. Ill. Central R. R. Co. vs. King, 179 Ill., 91. Ill. Terra Cotta Lumber Co. vs. Hanley, 214 Ill., 243.

The declaration in this case omitted to allege that plaintiff's disability was caused solely and exclusively from bodily injuries which were the direct and proximate results of violent, accidental, and involuntary means. These facts were raised by defendant's special plea. The burden of proving them however, was on the plaintiff. This was true even without the pleas, since these matters were a part of the contract of insurance, necessary to be proven to authorize a recovery.

The instruction given was in effect advising the jury that the clause in the contract of insurance which provided that the total disability must arise, "solely and exclusively from bodily injury which was the direct and proximate result of and caused solely and exclusively by external, violent, accidental and involuntary means", might be disregarded by them.

Under all the circumstances in this case, this instruction should not have been given. The giving of other instructions could not cure the error.

A further discussion is not here necessary since the case must be reversed and remanded on account of errors indicated. Case reversed and remanded.

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(To be published in abstract only.)

declaration to determine the issues to be tried. The practice of giving such instructions while not alone, regarded as reversible error, had been repeatedly held not commendable. Baker, 111. 243. 111. 243.

The declaration in this case omitted to allege that plaintiff's disability was caused solely and exclusively from bodily injuries which were the direct and proximate results of violent, accidental, and involuntary means. These facts were raised by defendant's special plea. The burden of proving them however, was on the plaintiff. This was true even without the plea, since these matters were a part of the contract of insurance, necessary to be proven to authorize a recovery.

The instruction given was in effect advising the jury that the clause in the contract of insurance which provided that the total disability must arise, "solely and exclusively from bodily injury which was the direct and proximate result of and caused solely and exclusively by external, violent, accidental and involuntary means", might be disregarded by them.

Under all the circumstances in this case, this instruction should not have been given. The giving of other instructions could not cure the error.

A further discussion is not here necessary since the case must be reversed and remanded on account of errors indicated.

Case reversed and remanded.

REVEREND JUSTICE

(To be published in abstract only.)

*I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.*

*IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 9th day of October, A. D. 1913.*

*A. C. Millsbaugh*

*Clerk of the Appellate Court.*

# OPINION

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# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon on the Fourth Tuesday in the month of March in the year of our LORD, one thousand nine hundred and thirteen, the same being the 25th day of March, in the year of our LORD, one thousand nine hundred and thirteen.

Present:

Hon. JAMES C. McBRIDE, Presiding Justice.

Hon. OWEN P. THOMPSON, Justice.

Hon. HARRY HIGBEE, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff.

And afterwards in Vacation, after said March Term, to-wit: On the 9<sup>th</sup> day of October, A. D. 1913, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

1831.A. 638

~~ERROR TO~~

APPEAL FROM

McGuer

vs.

No. 58

March Term, 1913.

Circuit COURT

Madison COUNTY

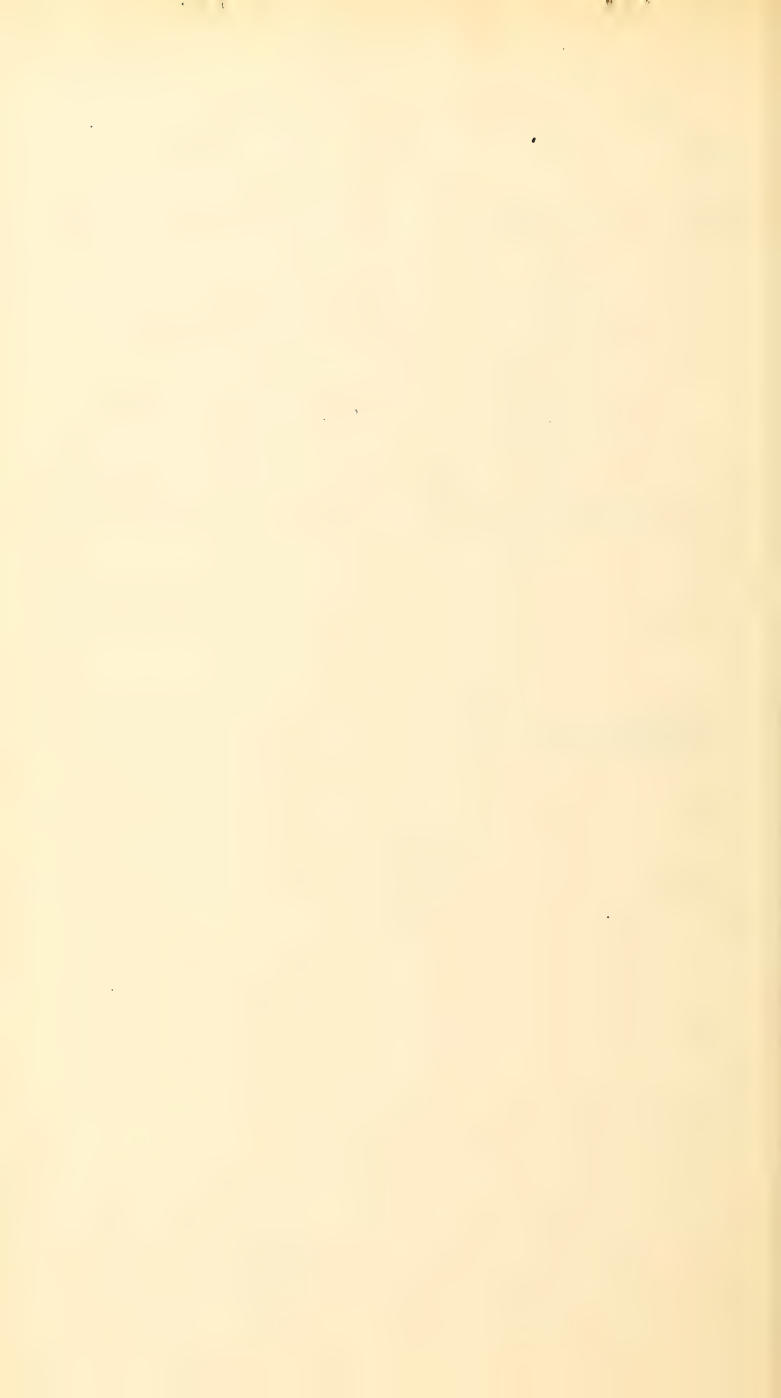
Moran

et al

TRIAL JUDGE

Hon.

W. E. Hadley





March Term, A. D. 1913.

|                              |   |                 |
|------------------------------|---|-----------------|
| Katie McGeever,              | ) | Appeal from the |
| vs. Appellant)               |   |                 |
| Joe Moran and Louis A. Cool, | ) | Madison County. |
| Appellees.)                  |   |                 |

1831.A. 638

Opinion by Thompson, J.

This suit was brought by appellant against appellees, under section Nine of the Dram Shop Act, <sup>g+a p 4609</sup> to recover damages for an alleged injury to her person, property and means of support occasioned by appellees selling or giving her husband intoxicating liquors.

The evidence shows that appellant's husband was employed by the Commonwealth Steel Company, at Granite City, as a molder and had been so employed for about nine years before the commencing of this suit. That after working about four years he had been promoted to night superintendent at a salary of one hundred sixty dollars per month. During the spring of 1910, he commenced to drink excessively, and by reason thereof he lost his position as night superintendent and was reduced to a position that paid but one hundred and twenty dollars per month. He continued the excessive use of intoxicants to such an extent that he was discharged altogether in November, 1911.

There was no evidence introduced to deny the fact that appellant's husband was drinking excessively during the years 1910 and 1911. The uncontradicted evidence is that during that time, he was habitually drunk. The evidence also shows that during all this time he had repeatedly bought liquors at appellee Moran's saloon. And that Moran had continued to sell him liquors after appellant had notified him not to do so. Moran offered no evidence to dispute these facts.



The proof clearly establishes the fact that appellant's husband during the time he was drinking heavily was constantly frequenting the saloons of appellees. That appellant and her son often found him drunk at appellees' saloons and assisted him or took him home. It also appears from the evidence that while drunk he was quarrelsome and abusive to his wife and child. That while in a drunken condition, he frequently struck and beat appellant. That during this period he neglected to furnish appellant and his children with support.

Appellee Cool to meet appellant's evidence, produced witnesses who testified that appellant quarrelled with her husband during the period of his drunkenness and he denied also making sales after he had been notified by appellant to desist, from selling liquors to her husband.

While it was a question of fact for the jury as to whether sales or gifts of intoxicating liquors were made to appellant's husband which contributed to his drunkenness and appellant's injury as alleged, still where the jury disregards the evidence as they must have done, as to the case of Moran, the Court under all the facts and circumstances appearing from the record in this case cannot but conclude they failed to properly consider and weigh the evidence as to his co-defendant Cool.

Appellee's instruction, No. 1, was misleading in that it practically limited appellant's right of recovery to "injury to her means of support.", The declaration charges and the statute, <sup>24 R. 4669</sup> authorizes recovery for injuries to person or property if the evidence warrants it. There were acts of personal violence shown by the evidence.

The verdict of the jury is so clearly against the manifest weight of the evidence that it was error to overrule the motion for new trial.

The case will, for errors indicated, be reversed and remanded.

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(To be published in abstract only.)

The proof clearly established the fact that appellant's husband during the time he was drinking heavily was consistently frequenting the saloons of appellant. That appellant was not only often found in drunk at appellant's saloons and assisted him or took him home. It also appears from the evidence that while drunk he was quarrelsome and abusive to his wife and child. That while in a drunken condition, he was usually drunk and best appellant. That during this period he neglected to turn in appellant and his children with support.

Appellee Cool to meet appellant's evidence, produced witnesses who testified that appellant quarrelled with her husband during the period of his drunkenness and he denied also making sales after he had been notified by appellant to desist, from selling liquors to her husband.

While it was a question of fact for the jury as to whether sales or gifts of intoxicating liquors were made to appellant's husband which contributed to his drunkenness and appellant's injury as alleged, still where the jury disregards the evidence as they must have done, as to the case of woman, the Court under all the facts and circumstances appearing from the record in this case cannot but conclude they failed to properly consider and weigh the evidence as to the co-defendant Cool.

Appellee's instruction, No. 1, was misleading in that it practically limited appellant's right of recovery to "injury to her person or property." The instruction further states that the evidence authorized recovery for injuries to person or property if the evidence warrants it. There were acts of personal violence shown by the evidence.

The verdict of the jury is so clearly against the appellant that the evidence that it was error to overrule the motion for new trial.

The same error, the court admitted, as was pointed out by the appellant.

(To be published in abstract only.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 9<sup>th</sup> day of October, A. D. 1913.

A. C. Millspaugh

Clerk of the Appellate Court.

OPINION

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# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon on the Fourth Tuesday in the month of March in the year of our LORD, one thousand nine hundred and thirteen, the same being the 25th day of March, in the year of our LORD, one thousand nine hundred and thirteen.

Present:

Hon. JAMES C. McBRIDE, Presiding Justice.

Hon. OWEN P. THOMPSON, Justice.

Hon. HARRY HIGBEE, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff.

And afterwards in Vacation, after said March Term, to-wit: On the 9<sup>th</sup> day of October, A. D. 1913, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

183 I.A. 639

~~ERROR TO~~

APPEAL FROM

Bosley, Admr.

vs.

No. 59

March Term, 1913.

Circuit COURT

Marion COUNTY

B. & O. S. W. R. R. Co.

TRIAL JUDGE

Hon. A. M. Rose



March Term, A. D. 1913.

James Bosley, Administrator of  
the Estate of Dora M. Bosley,  
Deceased,

Appellee,  
vs.

The Baltimore and Ohio South-  
western Railroad Company,  
Appellant.

Appeal from the  
Circuit Court of  
Marion County.

183 I.A. 639

Opinion by Thompson, J.

This suit was brought by appellee, James Bosley, administrator of the estate of Dora M. Bosley, deceased, against appellant, the Baltimore and Ohio Southwestern Railroad Company to recover damages on account of the death of Dora M. Bosley, who was killed by a locomotive and train of appellant by being struck by said locomotive on November 24, 1911, in the village of Xenia, Illinois.

There are four counts in the declaration. The first Charging common law negligence; the second failure to ring a bell or sound a whistle; the third, violation of speed ordinance, and the fourth substantially same as the third. The evidence shows that the accident occurred at an intersection of a sidewalk and the right of way of appellant in the city of Xenia, <sup>Illinois.</sup> on or about the 24th day of November, 1911, and about 11 o'clock in the morning. There are two principal streets in the village of Xenia running parallel with each other, east and west. They are separated by the railroad tracks and right of way of appellant running parallel therewith. The road to the north of said tracks is called Front Street. The one on the south of said tracks is called Fairfield Street. The sidewalk or public crossing in question runs north and south connecting the two streets in question, thereby intersecting with the railroad tracks of appellant. To the west of the said sidewalk and crossing in question is appellant's station platform. North of this platform

March Term, A. D. 1913.

Appeal from the  
Circuit Court of  
Madison County.

James Bosley, Administrator of  
the Estate of John M. Bosley,  
deceased,  
Appellee,  
vs.  
The Baltimore and Ohio North-  
western Railroad Company,  
Appellant.

1831 A. 63

Opinion by Thompson, J.

This suit was brought by appellee, James Bosley, administrator of the estate of John M. Bosley, deceased, against appellant, the Baltimore and Ohio Northwestern Railroad Company, to recover damages on account of the death of John M. Bosley, who was killed by a locomotive car owned and operated by said locomotive on November 24, 1911, in the village of Xenia, Illinois.

There are four counts in the declaration. The first charge is that the appellant, the Baltimore and Ohio Northwestern Railroad Company, violated the third, violation of speed ordinance, and the fourth substantially same as the third. The evidence shows that the accident occurred at an intersection of a sidewalk and the right of way of appellant in the city of Xenia, Illinois, on the first day of November, 1911, and about 11 o'clock in the morning. There are two principal streets in the village of Xenia, Illinois, running parallel with each other, east and west. They are separated by the railroad tracks and right of way of appellant running parallel therewith. The road to the north of said tracks is called Front Street. The one on the south of said tracks is called Lathrop Street. The sidewalk on public crossing in question runs north and south connecting the two streets in question, thereby intersecting with the railroad tracks at right angles. To the west of the said sidewalk and crossing is appellant's station platform, north of this platform

is appellant's station building.

On the day in question the deceased had been transacting business on Front Street and was going south on the said sidewalk or crossing toward Fairfield Street.

The evidence shows that it was a dark, cloudy day and very chilly with a strong wind blowing from the northwest. That the appellee's intestate was dressed warmly and had wrapped about her head and ears a heavy shawl commonly designated as a ~~shawl~~ fascinator. The evidence further shows that the appellant's passenger train which struck her was coming from the west at a speed of forty-five to fifty miles an hour.

There is a decided conflict in evidence as to whether any signal was given by whistle or the ringing of a bell as required by law. The evidence being that some witnesses heard from one to four blasts of a whistle at different intervals from each other. Some witnesses testified to the ringing of a bell before the accident happened. While other witnesses who were near the scene of the accident testified they heard no bell rung or whistle sounded but had there been such whistle blown or bell rung they could have heard the same.

The evidence shows that appellee's intestate looked west when she was just on the track and the locomotive was upon her. That she was struck with the pilot of the engine and thrown to one side about fifteen feet from the track. That she was dead when she was picked up.

It appears that the distance from the sidewalk on Front Street to the north side of the station platform is about 97.8 feet and the platform is 12.6 feet wide. From the south line of the platform to the north rail of the railroad track is 2 feet and 6 inches. There is a station building 62 feet 10 inches long and 16 feet 2 inches wide, the south line of which is the north line of the platform and the line of the east end of the station building is 78 feet west of the sidewalk in question.

On the day in question the deceased had been functioning as a brakeman on Front Street and was going south on the said side-  
walk or crossing towards 10th Street.  
The evidence shows that it was a dark, cloudy day and very  
windy with a strong wind blowing from the northwest. That the  
deceased's intestate was dressed warmly and had wrapped about her  
head and wore a heavy shawl commonly designated as a "shawl" or  
"blanket". The evidence further shows that the deceased was  
walking south which struck her was coming from the west at a speed  
of forty-five to fifty miles an hour.

There is a decided conflict in evidence as to whether any  
signal was given by whistle or the ringing of a bell as required  
by law. The evidence being that some witnesses heard from one  
or four blasts of a whistle at different intervals from each  
other. Some witnesses testified to the ringing of a bell before  
the accident happened. While other witnesses who were near the  
scene of the accident testified they heard no bell ring or whistle  
sounded but had there been such whistle blown or bell rung  
they would have heard the same.

The evidence shows that appellant's intestate looked west  
when she was last seen and the testimony was that  
that she was struck while the front of the engine was about  
one side about fifteen feet from the track. That she was heard  
that she was picked up.

It appears that the distance from the sidewalk on Front  
Street to the north side of the station platform is about 9.5  
feet and the platform is 12.5 feet wide. From the south side of  
the platform to the north wall of the railroad track is 5 feet  
and 6 inches. There is a station building 68 feet 10 inches  
long and 10 feet 6 inches wide, the south side of which is  
partially on the platform and the line of the south end of the  
station building is 78 feet west of the sidewalk in question.



A bay window on the south side of the station house juts south toward the railroad tracks 2 feet 10 inches. South of the bay window and about half way across the platform is a semaphore.

It cannot be determined from the evidence whether the deceased looked in the direction of the train was approaching from, before she went on the tracks or not. The witnesses who saw her going along the sidewalk in that direction testified they did not see her look, but no one claims to have been watching her continuously. The testimony of appellant's witnesses, Blackburn and Bumgarner, is relied on to show that deceased did not look westward toward the incoming train and yet their observation of her was not continuous. While it is true as contended by counsel for appellant that the speed of the train, although moving at a rate greatly in excess of the rate fixed by law at that place, would not relieve Mrs. Besley from the duty to exercise due care for her own safety, it is also true that such speed at that place was in violation of law and the injury there received will be presumed to have resulted from such negligence. This presumption may be rebutted by evidence showing that deceased was not exercising due care at and just prior to the accident, and if the accident was the result of her want of care there could be no recovery.

All the facts surrounding the accident were before the jury and further it appears that they were also before another jury at a former trial. Each of these independent juries found the facts to be against appellant. Under such circumstances a court of review will hesitate to declare the verdict was manifestly against the weight of the evidence. While the evidence is not so clear and convincing as to be wholly satisfactory, still we cannot say it does not warrant the verdict rendered on it.

Appellant complains of the instructions offered and refused. The first refused instruction contained the statement that pos-

A bay window on the south side of the station house just south  
toward the railroad tracks is about 10 inches. South of the bay  
window and about half way across the platform is a bench.  
It cannot be determined from the evidence whether the de-  
ceased looked in the direction of the train was approaching  
from, before she went on the tracks or not. The witnesses who  
saw her going along the sidewalk in that direction testified  
they did not see her look, but no one claims to have seen watch-  
ing her continuously. The testimony of appellant's witnesses,  
Blackburn and Wagner, is relied on to show that deceased did  
not look westward toward the incoming train and yet their ob-  
servation of her was not continuous. While it is true as con-  
fessed by counsel for appellant that the speed of the train, al-  
though moving at a rate greatly in excess of the rate fixed by  
law at that place, would not relieve Mrs. Fowler from the duty  
to exercise due care for her own safety, it is also true that  
such speed at that place was in violation of law and the injury  
there received will be presumed to have resulted from such neg-  
ligence. This presumption may be rebutted by evidence showing  
that deceased was not exercising due care at and just prior  
to the accident, and if the accident was the result of her want  
of care there will be no recovery.  
All the facts surrounding the accident were before the jury  
and it is their duty to determine whether or not Mrs. Fowler was  
at a former trial. Each of these independent juries found the  
facts of the accident established. When both witnesses a jury  
of review will hesitate to declare the verdict was manifestly  
against the weight of the evidence. While the evidence is not  
so clear and convincing as to be wholly satisfactory, still we  
cannot say it does not warrant the verdict rendered on it.  
Appellant complains of the instructions given and requests  
The first witness instruction contained the statement that nec-

itive evidence as to the fact that the bell was rung or whistle blown is entitled to more weight than negative evidence in relation to the same fact.

This instruction was properly refused under the circumstances. The rule of law invoked in that instruction depends on the fact asserted or denied. It may or may not apply to the particular facts.

The instruction would likely be regarded by the jury as referring to witnesses instead of evidence. The same is true of the second instruction. The third instruction stated that due care of deceased required that she look up and down the track and listen to ascertain if a train was approaching, and unless it appeared from the evidence that she did so look and listen, she was guilty of such contributory negligence as would bar a recovery. While it may be regarded as negligence in some conditions and situations not to stop, look and listen, still the question whether it is so or not depends on the facts and circumstances surrounding the person at the time, and these are always matters for a jury to consider. This rule of law disposes of the objections on account of the refusal of the fourth and fifth instructions.

The other refused instructions contain no proper legal principles which were not presented in the instructions given at the request of the defendant. We fail to discover any prejudicial error in the giving or refusing instructions.

The case seems to have been fairly submitted to the jury, and the verdict has the sanction of the judge who tried the case, and under all the circumstances we cannot say the verdict is so manifestly against the weight of the evidence as to require a reversal of the judgment. Judgment affirmed.

(To be published in abstract only.)

itive evidence as to the fact that the ball was hung or elastic  
hewn is entitled to more weight than negative evidence in re-  
lation to the same fact.

This instruction was properly retained under the circum-  
stances. The rule of law involved in that instruction depends  
on the fact asserted or denied. It may or may not apply to the  
particular facts.

The instruction would likely be regarded by the jury as  
referring to witnesses instead of evidence. The same is true  
of the second instruction. The third instruction stated that  
the case of deceased required that she look up and down the  
track and listen to ascertain if a train was approaching, and un-  
less it appeared from that evidence that she did so look and  
listen, she was guilty of such contributory negligence as would  
bar a recovery. While it may be regarded as negligence in some  
conditions and situations not to stop, look and listen, still  
the question whether it is so or not depends on the facts and  
circumstances surrounding the person at the time, and these  
are always matters for a jury to consider. The rule of law  
disposes of the objections on account of the removal of the  
fourth and fifth instructions.

The third instruction contains no error of law.  
principles which were not presented in the instructions given  
at the request of the defendant. To fail to discover any pre-  
judicial error in the giving or retaining instructions.  
The case seems to have been fairly submitted to the jury,  
and the verdict had the sanction of the judges who tried the case,  
and under all the circumstances we cannot say the verdict is so  
manifestly against the weight of the evidence as to require a  
reversal of the judgment. Reversed and remanded.

WTO be published in weekly issue.

*I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.*

*IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court  
at Mt. Vernon, this 9th day of October,  
A. D. 1913.*

*A. C. Millsbaugh*  
Clerk of the Appellate Court.

# OPINION

*Fee \$ .00*



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# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon on the Fourth Tuesday in the month of March in the year of our LORD, one thousand nine hundred and thirteen, the same being the 25th day of March, in the year of our LORD, one thousand nine hundred and thirteen.

Present:

Hon. JAMES C. McBRIDE, Presiding Justice.

Hon. OWEN P. THOMPSON, Justice.

Hon. HARRY HIGBEE, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff.

And afterwards in Vacation, after said March Term, to-wit: On the 25th day of October, A. D. 1913, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

183 I.A. 640

ERROR TO  
APPEAL FROM

Shockett

et al

No. 63

vs.

March Term, 1913.

Circuit

COURT

Jasper

COUNTY

Logan

et al

TRIAL JUDGE

Hon.

J. C. McBride



March Term, A. D. 1913.

Mary D. Hockett and  
Mahlon Hockett, )  
Appellees, )  
vs. )  
William S. Logan, et al., )  
Appellants. )

Appeal from Jasper.

183 I.A. 640

Opinion by Thompson, J.

Mary D. Hockett, one of the appellees, filed her bill in the Circuit Court of Jasper County, alleging ownership in herself of the S½ of the E. W.¼ of Sec. 9, Town 6N., Range 14 W. in said Jasper County; that she derived title by warranty deed from Mahlon Hockett, date August 31, 1911.

On September 15, 1911, a judgment by confession was entered in Edgar County, Illinois, against Mahlon Hockett in favor of appellants, by virtue of a judgment note executed by said Mahlon Hockett. On this judgment appellants had an execution issue and directed the officer to levy on the above described lands. A levy was made as directed and subsequently a sale was made of said lands under said execution and appellants became the purchasers at said sale and received a certificate of purchase from the sheriff.

Appellee, Mary D. Hockett, filed the original bill in this case to cancel the certificate of sale and remove the cloud from her title to said land, which has been cast thereon as she claims by the levy and sale as aforesaid.

Appellants contend that the conveyance from Mahlon Hockett to Mary D. Hockett was a voluntary one, without any valuable consideration and that Mahlon Hockett was the real owner of the fee in the said land.

A brief statement of the history of the dealings between all the parties in reference to these lands is necessary to a proper

March Term, A. D. 1913.

Appeal from Jasper.

1831.A.640

William S. Logan, et al.,  
Appellants,  
vs.  
Mary D. Hockett and  
William Hockett,  
Appellees.

Opinion by Thompson, J.

Mary D. Hockett, one of the appellees, filed her bill in the Circuit Court of Jasper County, alleging ownership in her- self of the S<sup>1</sup>/<sub>2</sub> of the N. E. <sup>1</sup>/<sub>4</sub> of Sec. 9, Town 3N., Range 14 E. IN said Jasper County; that she derived title by warranty deed from William Hockett, dated August 31, 1911.

On September 10, 1911, a judgment by reference was entered in Edgar County, Illinois, against William Hockett in favor of appellee, of which a judgment note entered up and signed Hockett. In this judgment Hockett lost an undivided share and directed the officer to levy on the above described lands. A levy was made and returned and subsequently a sale was made of said lands under said execution and appellee became the pur- chaser at said sale and received a certificate of purchase from the sheriff.

Appellee, Mary D. Hockett, thereupon filed in this case to cancel the certificate of sale and remove the cloud from her title to said land, which has been cast thereon as the claim of the levy and sale as aforesaid.

Appellants contend that the conveyance from William Hockett to Mary D. Hockett was a voluntary one, without any valuable con- sideration and that William Hockett was the real owner of the fee in the said land.

A brief statement of the history of the litigation between the parties is required as some issue is presented in a proper

understanding of the decision arrived at in this case.

Sometime in August, 1910, Mahlon Hockett purchased from appellant William S. Logan, the hotel property in Paris, Illinois, known as the "Grant House," for eight thousand Dollars (\$8,000.00). The consideration given was made up of a note and property valued at two thousand four hundred dollars(\$2,400.00), belonging to Mary D. Hockett and furnished to her husband Mahlon Hockett by her, to assist him in making the purchase and the remainder of the purchase price was represented in a note given to William S. Logan by Mahlon Hockett for five thousand six hundred dollars(\$5,600.00).

It appears that on February 13, 1911, Mahlon Hockett made a deed of "Grant House" property to his wife Mary D. Hockett, the consideration being the twenty-four hundred dollars(\$2,400.00) owed to her on account of the note and property furnished her husband to make the trade with William S. Logan for the "Grant House" and she also gave her husband a deed to the lands in controversy here as balance of consideration for the "Grant House" property.

Afterwards, to wit:- On August 31, 1911, Mahlon Hockett and Mary D. Hockett traded back, Mahlon deeding the land to Mary, and Mary deeding "Grant House" property to Mahlon. In addition to said land, Mahlon deeded two lots to Mary of the value of about twenty-four hundred dollars(\$2,400.00), so at the close of that transaction, Mary had her land just as she had it before, and had taken the two lots in consideration of the twenty-four hundred dollars (\$2,400.00) owed her by Mahlon. These lots were worth about twenty-four hundred dollars(\$2,400.00).

These transactions all took place before the judgment was rendered against Mahlon Hockett.

Unless it appears from the record in this case that the deed from Mahlon Hockett to Mary D. Hockett of the lands in ques-

understanding of the decision arrived at in this case.

Sometime in August, 1910, Nathan Hockett purchased from appellant William S. Logan, the hotel property in Paris, Illinois, known as the "Grant House," for eight thousand dollars (\$8,000.00). The consideration given was made up of a note and property valued at two thousand four hundred dollars (\$2,400.00), belonging to Mary D. Hockett and furnished to her husband Nathan Hockett by her, to assist him in making the purchase and the remainder of the purchase price was represented in a note given to William S. Logan by Nathan Hockett for five thousand six hundred dollars (\$5,600.00).

It appears that on February 13, 1911, Nathan Hockett made a deed of "Grant House" property to his wife Mary D. Hockett. The consideration being the twenty-four hundred dollars (\$2,400.00) used to get an account of the note and property furnished by husband to make the trade with William S. Logan for the "Grant House," and the also gave her husband a deed to the land to the twenty-five hundred dollars (\$2,500.00) consideration for the "Grant House."

Accordingly, as with - On August 21, 1911, Nathan Hockett and Mary D. Hockett traded back, Nathan deeding the land to Mary and Mary deeding "Grant House" property to Nathan. In addition to said land, Nathan deeded two lots to Mary of the value of about twenty-four hundred dollars (\$2,400.00), as at the close of last transaction, Mary had her land just as she had it before, and had taken the two lots in consideration of the twenty-four hundred dollars (\$2,400.00) owed her by Nathan. These lots were with said twenty-four hundred dollars (\$2,400.00). These transactions all took place before the judgment was

rendered against Nathan Hockett.

Unless it appears from the record in this case that the deed from Nathan Hockett to Mary D. Hockett of the land in ques-



tion a voluntary one or that some fraudulent arrangement was sought to be effected by which appellants were to be defeated in their just demands against appellees; this court must affirm the decree of the lower court.

The trial court found and decreed that the transactions of Mary D. Hockett and her husband, Mahlon Hockett in reference to the real estate in question were in good faith, and that the conveyance of it by Mahlon Hockett to his wife was not a voluntary one. We are of the opinion that there is ample evidence in this case to support said findings, and that the decree was clearly right. The findings of a chancellor who tries a case on oral evidence, will be upheld unless they are palpably erroneous. *Baker vs. Rockabrand*, 118 Ill. 370. *Peabody vs. Kendall*, 145 Ill. 519. *Geall vs. Dingman*, 227 Ill. 294.

It would have been inequitable had the court decreed otherwise. Decree affirmed.

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McBride, Judge, took no part in this case.

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(To be published in abstract only.)

than a voluntary one or that some fraudulent arrangement was  
 sought to be effected by which appellants were to be benefited  
 in their just demands against appellees; this court must affirm  
 the decree of the lower court.  
 The trial court found and decreed that the transactions of  
 the appellants and appellees, and the parties thereto in reference to  
 the real estate in question were in good faith, and that the  
 evidence was such as to lead to the conclusion that there is ample evidence  
 to show that the appellants were not guilty of any fraud or  
 other wrong in the premises. The findings of the trial court are  
 affirmed. The findings of the trial court are affirmed. The findings of  
 the trial court are affirmed. The findings of the trial court are affirmed.  
 It would have been inadvisable had the court decreed otherwise.

The trial court is affirmed. The trial court is affirmed. The trial court is affirmed.

(To be published in abstract only.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 9th 1913 day of October, A. D. 1913.

*A. C. Millspaugh*  
Clerk of the Appellate Court.

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# OPINION

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*Fee \$* .....

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